TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1965

No. ~~652~~ 28

TRANSPORTATION-COMMUNICATION EMPLOYEES UNION, PETITIONER,

vs.

UNION PACIFIC RAILROAD COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 7, 1965
CERTIORARI GRANTED FEBRUARY 21, 1966

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 652

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

INDEX

RECORD PRESS, PRINTERS, NEW YORK, N. Y., MARCH 31, 1966

[fol. 1]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Pleas and proceedings before The Honorable Alfred A. Arraj, Chief Judge of the United States District Court for the District of Colorado, and The Honorable Hatfield Chilson, Judge of the United States District Court for the District of Colorado, presiding in the following entitled cause:

THE ORDER OF RAILROAD TELEGRAPHERS,
3860 Lindell Boulevard, St. Louis 8, Missouri, Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY,
Omaha, Nebraska, Defendant.

No. 8107, Civil

COMPLAINT—Filed July 12, 1963

Comes now The Order of Railroad Telegraphers, and for complaint against the defendant says:

1. This is a suit of a civil nature, to enforce an award and order of the National Railroad Adjustment Board, Third Division. This Court has jurisdiction of this action pursuant to Section 3, First (p) of the Railway Labor Act, as amended (Act of June 21, 1934, c. 691, Section 3, 48 Stat. 1189; U.S.C. Tit. 45, § 153, First, (p).)

2. The plaintiff is an unincorporated association with headquarters at 3860 Lindell Boulevard, St. Louis 8, Missouri. It is a standard railway labor organization of employees organized in accordance with the Railway Labor Act as amended. Its purpose and function are to serve as [fol. 2] the representative duly designated and authorized under the Railway Labor Act of employees in the craft or

class commonly known as telegraphers, on carriers subject to the Railway Labor Act, throughout the United States.

3. The defendant is a corporation incorporated under the laws of the State of Utah, is a carrier by railroad extensively engaged in interstate railroad transportation, as such carrier is subject to the Interstate Commerce Act, and is a "carrier" as defined in Title I of the Railway Labor Act as amended (U.S.C. Tit. 45, §§ 151 et seq.) The defendant's principal operating office is located in Omaha, Nebraska. It operates through the district of the United States District Court for the District of Colorado.

4. The plaintiff is, and for many years has been, the duly authorized and designated collective bargaining representative of the defendant's employees comprising the craft or class commonly known as Telegraphers. The plaintiff entered into an agreement with the defendant many years ago, covering work in the Telegrapher craft. That agreement has been revised from time to time and, so far as is here relevant, bears an effective date of January 1, 1952. The provisions of said agreement pertinent to the matter here in controversy are set forth on pages 3, 10, 11 and 12 of Exhibit 1 attached to this complaint and made a part hereof.

5. Prior to August 25, 1952, pursuant to the provisions of the agreement above described, only employees of the defendant represented by the plaintiff and subject to said agreement were assigned by the defendant to work in connection with transmitting and receiving communications of record such as consist reports of freight trains, manifest passing reports, manifest set-out and pick-up reports, and other related work; more particularly, such assignments of such work exclusively to such employees prevailed at defendant's Las Vegas (Nevada) Yard. All such work in defendant's Las Vegas Yard was, prior to August 25, 1952, performed by employees represented by the plaintiff and

subject to its aforesaid agreement at an office in said yard known as the Depot Telegraph Office or "VG" telegraph office. At said telegraph office such employees of various classifications qualified to perform such work were on duty in three shifts covering all twenty-four hours of each day.

On August 25, 1952 the defendant opened, in its Las Vegas Yard, at a point approximately one and one-quarter [fol. 3] miles distant from "VG" telegraph office, another office known as the West End Yard Office. In its West End Yard Office the defendant installed various IBM machines, specifically enumerated on pages 44 and 45 of Exhibit 1 attached hereto and made a part hereof. Some of such machines were for the purpose of performing and performed the functions in connection with transmitting and receiving communications of record theretofore performed exclusively by employees of the defendant represented by the plaintiff and subject to its aforesaid agreement. After the installation of such machines all work in connection with the operation of said machines, including the performance of the work theretofore performed exclusively by defendant's employees represented by the plaintiff and subject to its aforesaid agreement was assigned to employees of the defendant not so represented and not subject to said agreement.

7. Thereupon the plaintiff, through its General Committee on the defendant's railroad made claims upon the defendant claiming that such assignments were in violation of defendant's agreement with the plaintiff, seeking correction of such violations and claiming appropriate monetary compensation for employees subject to its agreement with the defendant to recompense them for loss of earnings suffered by reason of such violations, all as more fully set forth in Exhibit 1 attached hereto and made a part hereof.

8. The plaintiff handled said claims in the usual manner with the designated officials of the defendant up to and

including the highest operating officer of the defendant designated to handle such disputes. Having exhausted all possibilities of settling such disputes by negotiation with the defendant and having failed to reach an adjustment in this manner, the plaintiff thereupon submitted said claims to the National Railroad Adjustment Board, Third Division, as more fully set forth in Exhibit 1 attached hereto and made a part hereof.

9. After considering the evidence and the contentions of the parties, the National Railroad Adjustment Board, Third Division, issued Award No. 9988 on July 14, 1961 sustaining the plaintiff's claims to the extent set forth in the Award, Findings and Opinion of the Board, and on the same day issued an Order directing the defendant to make the Award effective on or before January 1, 1962. Exhibit 1 attached hereto and made a part hereof consists of certified copies of said Award and Order.

[fol. 4] 10. All facts stated in "Statement of Claim," "Employes' Statement of Facts," "Position of Employes," "Opinion of Board," "Findings," and "Award" in Exhibit 1 attached hereto are incorporated herein as statements of fact herein set forth.

11. Notwithstanding the Award and Order set forth in Exhibit 1 attached hereto the defendant has refused and continues to refuse to comply with said Award and Order.

Wherefore, the plaintiff prays that pursuant to Section 3, First, (p) of the Railway Labor Act (U.S.C. Tit. 45, § 153, First, (p)) the Court make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce the Award and Order referred to in Exhibit 1 hereof, and requiring the defendant to make an accounting to the plaintiff of all monies due under the aforesaid Award and Order to employees represented by the plaintiff, and for such other further relief as may appear to be just and equitable.

Lester P. Schoene, Philip Hornbein, Jr., Attorneys for the Plaintiff.

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EXHIBIT 1 TO COMPLAINT

Award No. 9988
Docket No. TE-6800

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

THOMAS C. BEGLEY, REFEREE

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

UNION PACIFIC RAILROAD COMPANY
(South-Central District)

STATEMENT OF CLAIM: Claim of The Order of Railroad Telegraphers on the Union Pacific Railroad, South-Central and Northwestern Districts, that:

(a) The Carrier has violated and continues to violate the agreement between the parties signatory thereto, when it requires or permits employes not covered by said agreement to "handle" train orders at West End Yard Office, Las Vegas, Nevada, and

(b) that the Carrier has violated and continues to violate the agreement when it requires or permits other than those covered by said agreement to operate printing and/or mechanical telegraph machines used in the transmission or reception of messages and reports of record, and/or to perforate tape or cards as a function in the transmission or reception of messages and reports of record at the West End Yard Office, Las Vegas, Nevada, and

(c) that for such violations the Carrier shall compensate the senior idle employe or employes covered by the Telegraphers' Agreement for the equivalent of a day's pay for each 8-hour shift, both day and night, since August 25, 1952, the date on which the new yard office at Las Vegas was placed in service, at the telegraphers' rate applicable to that particular location.

EMPLOYES' STATEMENT OF FACTS: An agreement bearing effective date of January 1, 1952, by and between the parties and referred to herein as the Telegraphers' Agreement, is in evidence.

In connection with the handling of train orders by employes not subject to the effective agreement at the Las Vegas Yard, Carrier's assistant superintendent issued the following bulletin:

Secretary's Certificate to foregoing paper (omitted in printing).

"UNION PACIFIC RAILROAD COMPANY
Office of Assistant Superintendent
Las Vegas, Nevada

[fol. 6]

August 21, 1952

ASST. SUPERINTENDENT'S CIRCULAR NOTICE NO. 122:

ALL TRAIN AND ENGINE MEN —
CALIF. FIRST SUBDIVISION
UTAH THIRD SUBDIVISION

Effective 7 A.M. (PST) Monday, August 25th, Las Vegas Yard will move from its present location to the new yard office located at West end of yard near Charleston Boulevard. Effective at that time, all waybills and train reports will be handled at the new Yard Office.

Conductors and trainmen arriving Las Vegas Westbound and leaving Las Vegas Eastbound will report for duty and finish tour of duty at Depot Telegraph Office, as has been the practice in the past. Waybills and train reports will be left or received at Depot Telegraph Office. Conductors should register in immediately, leaving all waybills and train reports at register for prompt dispatch to new yard office.

Conductors and trainmen leaving Las Vegas, Westbound and arriving Eastbound will report for duty and finish tour of duty at new yard office. Necessary clearances and train orders will be tubed to conductors there, and conductors will register in and out, using train registering ticket which will be tubed to Depot Telegraph Office. Regular register form will be provided for registering watch comparison.

Pneumatic tube has been provided for movement of waybills and reports between new yard office and Depot Telegraph Office. Where conductors leave waybills or reports at depot telegraph office, such waybills and reports should always be either enclosed in an envelope or carefully secured with rubber bands or string to insure handling without loss.

/S/ A. Bybee,
Ass't. Superintendent.

POST: Milford Las Vegas Kelso Yermo
CC: VWS WBG HSJ RDS KPV RAF JBC JEW"

The penultimate paragraph of the above quoted bulletin contains the instructions that pertain to the handling of train orders, clearance cards, etc., by clerical employes at the new yard office in lieu of bona fide telegraph service employes.

Concurrently with the opening of the new West End Yard Office at Las Vegas, Nevada, August 25, 1952, in addition to the pneumatic tube facilities used in connection with the handling of train orders and clearance cards, the Carrier installed certain machines in this new office which had for their purpose the performance of communications work, such as transmitting and receiving the following types of communications of record heretofore handled exclusively by telegraph service employes: (1) Consist reports of freight trains; (2) Manifest passing reports; (3) Manifest set-out and pick-up reports, and other related work.

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Instead of transferring telegraph service employes from "VG" telegraph office, located in another part of the yard, to the new West End Yard Office, or creating telegraph positions at this location, the Carrier acting alone, and without proper advance negotiations, created and assigned the work of operating the communications machines (teletypes, perforators and IBM equipment), as well as the "handling" of train orders and clearance orders for delivery to trains at the West End, to clerical employes, who are not employes covered by the Telegraphers' Agreement.

The new Las Vegas, West End Office, is located approximately one and one-fourth miles from "VG" telegraph office. Train Orders and clearance orders for westbound trains are transmitted by this pneumatic tube facility from "VG" telegraph office to the West End Yard Office by telegraphers who have copied these communications from the train dispatchers. When the tubes reach the West End Yard Office containing the train orders and clearance communications, clerical employes, who are not covered by the Telegraphers' Agreement, remove the contents from the tube and handle them for delivery to the employes on the trains addressed.

The Organization claimed a violation of the agreement and asked that the work of operating the communications machines and the handling of the train orders and clearances be properly assigned to telegraph service employes at the New West End Yard Office at Las Vegas with penalty payments accruing until such time that this work is properly assigned to such employes. The Carrier denied the claim.

POSITION OF EMPLOYES: It is the position of the employes that the Carrier violates the agreement when it assigns to employes not subject to said agreement the function of handling messages, orders, and reports of record, including the delivery of orders and clearance cards to train crews leaving the new West End Yard; which work was formerly performed by employes in the classes specified in the agreement.

As indicated in the Employes' Statement of Facts, there is a telegraph office listing telegraph service positions at Las Vegas incorporated in Article 2, Rule 5 at page 16 of the Agreement between the parties and the communications work belonging to these telegraphers at Las Vegas has also been negotiated as work belonging to these positions. That part of the rule applicable to Las Vegas reads:

"Rule 5. General Telegraph Offices

Seniority District	Location and Position	Rate of Pay Per Hour
* * *		
4	Las Vegas "VG"	
	Manager	$2.127
	2nd chief Operator	
	Printer Mechn.	1.995
	3rd Chief Operator	
	Printer Mechn.	1.995
	Telegrapher	1.851
* * *"		

[fol. 8]

There are telegraphers on duty around the clock at Las Vegas "VG" telegraph office which is located in Las Vegas freight yard approximately one and one-fourth miles distant from the new West End Yard Office.

On August 25, 1952, the Carrier opened a new Yard Office in Las Vegas Yard, known as West End Yard Office. In doing so it installed certain communications machines for employes assigned in that office to operate. It also inaugurated a pneumatic tube facility for communicating between the new West End Yard Office and "VG". As explained, "VG" telegraph office and the West End Yard office are located approximately one and one-fourth miles apart. Instead of moving the telegraphers from "VG" office to the new West End Yard office, or creating new telegraph service positions at West End Yard, the Carrier acting alone, without proper advance conference or agreement with the Organization, created new positions not covered by the Telegraphers' Agreement, and ordered the occupants of such positions to handle train orders and to operate the communications machines (teletype, perforators and IBM) in the performance of work that had heretofore been performed by telegraphers. The Carrier also required that the telegraphers at "VG" telegraph office transmit by pneumatic tube, all train orders and clearance orders concerning the movement of trains from that office to the new West End Yard office where the clerical employes who are not covered by the Telegraphers' Agreement, are required to take such train order communications from the tube and handle them for delivery to the employes on the trains addressed before such trains can depart from West End Yard at Las Vegas. In addition to this the Carrier also requires these employes who are outside the Telegraphers' Agreement to handle train register slips and communicate the time of arrival of trains. All of these communications and the work involved in their handling, was previously performed by telegraph service employes at Las Vegas prior to the installation of communications machines (known as teletype, perforators and IBM) in the new West End Yard Office when it was opened August 25, 1952.

The Organization avers that subsequent to August 25, 1952, employes not covered by the Telegraphers' Agreement, who are employed in the new West End Yard Office at Las Vegas, have been required or permitted by the Carrier to operate the communications machines, as well as "handle" train orders, clearance orders and messages; work that was previously handled and performed by and still belongs to telegraph service employes under the terms of the Telegraphers' Agreement, at Las Vegas. Here we have the Carrier, acting alone, removing work from under the scope of the Telegraphers' Agreement and transferring and assigning such work to outside employes.

The handling of this claim on the property is reflected in the following which are attached as Employes' Exhibits. We respectfully request that each of these exhibits be made a part of this claim:

August 21, 1952, Circular Notice No. 122 from Assistant Superintendent A. Bybee to All Train and Engine Men. (Employes' Exhibit No. 1). This has already been quoted in the Employes' Statement of Facts.

September 10, 1952, letter from General Chairman A. S. Herrera to Supervisor of Wage Schedules, A. L. Dixon. (Employes' Exhibit No. 2). This letter protested the violations resulting from Carrier's notice No. 122 and established the claim of the Organization.

September 23, 1952, letter from Supervisor of Wage Schedules to General Chairman. (Employes' Exhibit No. 3). In this letter Carrier admits the violations, but denies claim.

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October 20, 1952, letter from General Chairman appealing claim to Assistant to Vice President F. C. Wood. (Employes' Exhibit No. 4).

October 23, 1952, letter of acknowledgment from Assistant to Vice President to General Chairman. (Employes' Exhibit No. 5).

November 17, 1952, letter from Assistant to Vice President to General Chairman concerning official denial of the top ranking official of Carrier to whom appeals are made. (Employes' Exhibit No. 6).

December 5, 1952, letter from General Chairman to Assistant to Vice President in which the Organization placed the Carrier on notice that the claim would be appealed under the provisions of the Railway Labor Act, amended, and that all of the features of the violations complained about at Las Vegas would be incorporated into one claim in the same manner as handled on the property. (Employes' Exhibit No. 7).

In Employes' Exhibits Nos. 2 and 4, which have been made a part of this claim, we showed certain work performed on several days to prove that there were a considerable number of train orders and clearance orders handled daily by clerical employes not covered by the Telegraphers' Agreement at the new West End Yard Office at Las Vegas. While the Organization has copies of all of these train orders and clearances handled on each day listed in these exhibits, rather than burden the record with all of the evidence, we attach hereto and make a part hereof Employes' Exhibit No. 8, which contains reproduced copies of clearance orders handled by the clerical employes not covered by the Telegraphers' Agreement at the new West End Yard Office on an average day, August 27, 1952, which is typical of other similar days. There it will be seen that over a 24-hour period these employes outside the provisions of the Telegraphers' Agreement handled 9 clearance orders.

Employes' Exhibit No. 8(A) contains three train orders handled for delivery by clerks. One Form 31 and two Form 19 orders. All of these train orders and clearance orders were copied by a telegrapher at "VG" telegraph office from a train dispatcher and placed in the pneumatic tube and transmitted to the new West End Yard Office where employes not covered by the Telegraphers' Agreement proceeded to complete the handling of the orders by making delivery to the trains addressed.

It will be noted in Employes' Exhibit No. 8(A) that Form 31 train order No. 302 was signed by Conductor O. H. Harris of Extra 1876 West, at Las Vegas. In order to handle this type of train order, which is highly important and exacting in the movement of trains (that is why it requires the signature of the Conductor), under the new system inaugurated by the Carrier in the handling of train orders by pneumatic tube, the telegraph service employes at "VG" telegraph office, since August 25, 1952, are required to place any unsigned Form 31 train orders in the "tube" and send it to the West End Yard office where a clerical employe, not covered by the Telegraphers' Agreement, removes the train order from the "tube", takes it to the conductor of the train to which addressed, obtains the signature of the train conductor and returns the train order through the "tube" to "VG" telegraph office. The telegrapher at "VG" telegraph office then repeats the signature of the conductor to the train dispatcher over the wire and then receives "complete" to the order which he writes in the bottom line as shown on Form 31 Train Order No. 302, in Employes' Exhibit No. 8(A). After

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the train order is "completed" the necessary number of train orders together with the necessary number of clearance orders are placed in the "tube" by the telegrapher in "VG" office and sent back to the West End Yard office, where the employe outside the coverage of the Telegraphers' Agreement is again required to handle it for final delivery to the necessary members of the train crew to which addressed. It will be noted that all train orders and clearance orders are addressed to conductor and engineer, another copy is given to the rear brakeman, which means that at least three copies of all of these orders must be given to each train crew. Such requirements are clearly outlined in Carrier's Operating Book of Rules. Rule 210 of this book states:

> "Unless otherwise directed, when a train order has been transmitted, operators must repeat it in the succession in which the several offices have been addressed. Each operator receiving order must observe whether the others repeat correctly and inform train dispatcher if incorrectly repeated.
>
> '31' train orders must show time repeated; all train orders must show time made complete and operator's last name.
>
> '31' orders must be signed by conductor or engineer and others addressed, and signatures transmitted to train dispatcher. When a '31' order has been signed by conductor and made complete, operator will supply conductor with copies for himself, engineers and rear brakeman. When a '31' order has been signed by engineer and made complete, **operator will deliver copies to each engineer, and to conductor and rear brakeman.**
>
> When a '19' order has been made complete, **operator will deliver it to those addressed and rear brakeman,** except when delivery will take operator from vicinity of office, conductor or brakeman may make delivery." (Emphasis added.)

Here it will be seen that under the Carrier's own operating rules governing the movement of trains on its railroad, it specifically requires that:

> "Operator will deliver copies to each engineer and to conductor and rear brakeman."

This operating rule of the Carrier is further confirmed by the parties under Article 8, Rule 62 of the currently effective Telegraphers' Agreement which reads:

> "No employe other than covered by this schedule and train dispatchers will be permitted to handle train orders at telegraph or telephone offices where an operator is employed, and is available or can be promptly located, except in an emergency, in which case the telegrapher will be paid for the call."

There have been many awards of your Board dealing with the question of "handling train orders" similar to that which we here have at Las Vegas. For ready reference there is quoted next below excerpts from awards which cover specifically the identical issue here involved in the handling of train orders at Las Vegas:

[fol. 11]

Award No. 709:

"It would appear that under a fair and reasonable interpretation of this rule (meaning Article XIII), the handling of a train order should include not only the physical process of passing it from hand to hand in the performance of its function but also the work involved in its preparation."

Award No. 1169:

"* * * the Carrier sought to make delivery of train orders at a station where a telegrapher was employed, through means other than a telegrapher.

* * * * *

We have consistently held that such attempted circumvention of the rule was abortive. The Carrier emphasizes its right to conduct the working details of its railroad, and urges that if it may not proceed in the manner here it is being subjected to control by forces acting without authority. We do not view that problem in that light. The Carrier fixed the status of the station in question, denominating it a telegraphic one, and at all times important here assigned one telegrapher to the station. In such circumstances, what does the rule require? We have stated it often. Briefly, our holding has been that at all telegraphic stations, train orders shall go through telegraphers, 'in usual course if on duty, and pursuant to "call" if off duty,' directly to train crews. The purpose of the agreement was to assure telegraphers employed by carriers the full fruits of their employment. Award No. 86. The gist of our present holding is, and the spirit of all our holdings on the question involved has been, to give recognition to the reasonable meaning of the agreement, into which the carrier, no less than the employes, competently entered."

Award No. 1220:

"Under the scope and other rules of the Telegraphers' Agreement it is definitely established that work in connection with **the receipt and delivery of train orders belongs to employes coming within the jurisdiction of the Telegraphers' Agreement** * * *." (Emphasis added.) See also Awards 1221, 1222, 1223, 1224 and 1225 for like expressions.

Award No. 1304:

"In behalf of the claim it is urged that under Article XIII, of the Agreement, only telegraphers and train dispatchers may handle train orders at telegraph stations, hence, as said, orders from the dispatcher governing train No. 12 from Fort Madison, which, as we have seen, is such a station, should go to a telegrapher there, serving under call, if necessary, and delivered by that employe to the conductor who takes over the train at that point.

Any handling other than that advanced by the employes, including that adopted by the carrier here, as we are constrained to believe, breaches the Agreement. Hench, and not pausing for ex-

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tended statement and analysis of the Agreement, fully developed by the record, or of the many awards cited and digested by the parties in their written contentions, we conclude the claim should be sustained."

Award No. 1713:

"The provisions in Article 13 that no employe other than covered by the schedule will be permitted to 'handle' train orders means that the employe has the right to receive, copy, and deliver orders. Many awards of this Division have so construed this rule, which interpretation is in harmony with the scope rule, is sound, and should be and is adhered to by the Board. In Award 86 the Opinion states with reference to the rule:

> 'The Rule is quite clear and requires no unusual interpretation. Doubtlessly it was made for the purpose of preventing encroachments upon that work to which the employes in that particular craft were entitled. * * *' "

Award No. 5013:

"This division of the Board, after extended and spirited debate on the subject, is now definitely committed to the view that a Train Order Rule containing language of the kind to be found in the one now under consideration is clear and unambiguous and that its terms, particularly the phrase 'to handle train orders', are to be construed as contemplating the receiving, the copying, and the delivering of train orders to the train crews which are to execute them. See Awards 86, 709, 1166, 1422, 1680, 1713, 1878, 1879, 2087, 2926, 2928, 3611, 3612, 3670 and 4057. Also see Award 4770, where although the claim was denied on the ground it was based on the Scope Rule only, the foregoing interpretation was again approved and it was definitely indicated that had the Agreement contained a Train Order Rule similar to the instant one a sustaining award would have been required." (Emphasis added.)

Award No. 5087,

"This Division has repeatedly held that the handling of train orders within the contemplation of the ordinary train order rule such as we have here, means that the receiving, copying and delivering of train orders is reserved to telegraphers. Awards 2926, 4770."

Award No. 5122:

"It has long been the rule that the work of a class of employes reserved to them in a collective agreement cannot be delegated to others without violating the agreement. The Telegraphers' Agreement reserves the sending, receiving, copying and delivering of train orders to the telegraphers. It is also well established that the receiving of such communications includes copying and delivering to the train crews which are to execute them. Award 1713. The handling of train orders at a station where there is an employe covered by the Telegraphers' Agreement is work belonging to that employe. His right to the work cannot be circumvented by devices

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such as depositing the train orders in waybill boxes or attaching them to train registers. Award 1878. Nor may they be entrusted for delivery to someone not included within the class covered by the Agreement. Award 2087. Consequently, they may not be handed to one train crew for delivery to another. Award 2936."

Award No. 5810:

"The dispute involves the meaning of the term "to handle train orders' as used in Rule 26. The Carrier asserts that this expression means that telegraphers shall copy such orders and perform such duties with reference to them that require the skill or training of a telegrapher. It contends that the rule was never intended to prohibit the 'messengering' of train orders. The Organization contends that the handling of train orders includes their delivery to the addressee. This is a question that has been before this Board many times and it has repeatedly been held that the handling of train orders includes their delivery to the addressee. Awards 1713, 1719, 5013, 5087, 5122."

See also Awards 1719, 1422, 1680, 1878, 1879, 2087, 2926, 2928, 3611, 3612, 3670, 4057.

It has thus here been definitely established that, based on Article 8, Rule 62 and the above listed sustaining awards of your Board, as well as Carrier's own operating rules, the Carrier is acting in breach of the agreement in requiring or permitting employes not covered by the Telegraphers' Agreement at West End Yard, Las Vegas to handle train orders and clearance orders in lieu of bona fide telegraph service employes.

As for the violations concerning the transfer of work covering communication reports of record, from telegraph service employes at Las Vegas to clerical employes outside the Telegraphers' Agreement to perform on such machines as I.B.M., Teletype and reperforators, et al, the Organization attaches hereto Employes' Exhibit No. 9, which we ask be made a part of this claim.

This Employes' Exhibit No. 9 is a copy of IBM Form 819791 which is a car record card with perforations to indicate all the particulars as to the contents and destination, etc., of a certain car. Similar cards are used for each and every freight car moving in and out of Las Vegas Yard. When these cards are completed by clerical employes who are being required to operate the IBM machine which perforates these cards, the cards are assorted and placed in order of the position of the freight cars in the train. The cards so assorted are then placed in a machine that perforates tape by electrical impulses from the holes in the cards as these cards pass through the machine. This consist report work was formerly transmitted exclusively by telegraphers at Las Vegas.

Employes' Exhibit No. 10 which is also attached hereto and made a part of this claim is a sample of what the tape looks like and what it states. This sample copy is typical of the information that the tape contains.

After this tape is made from the IBM car record card it is then placed in a teletype machine which automatically prints and transmits the information contained on this tape that was taken from the car record cards which were perforated by the clerical employe. The Organization attaches hereto

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Employes' Exhibit No. 11 which is a typed consist report of a train and the final result of the information contained on the IBM car report card.

This train consist communication work was work formerly performed by telegraph service employes by telegraph, telephone and teletype — but now the Carrier with the installation of the new IBM facilities covering communications service, has turned the initial work, which is the perforating of the IBM car report card from the information on the waybills, over to clerical employes and, acting alone, has deliberately denied telegraphers the right to perform the communications functions involving this new device. The Organization submits that it has contracted for this work under the provisions of the Scope Rule and other rules of the effective contract and that the Carrier has arbitrarily taken such work away from telegraph service employes and has given the communications work to employes not covered by the Telegraphers' Agreement in breach of the contract extant between the parties.

The following rules of the Telegraphers' Agreement are invoked in this dispute:

"ARTICLE 1 — SCOPE

Rule 1. This agreement will govern the wages and working conditions of agents, agent-telegraphers, agent-telephoners, telegraphers, telephoners, telegrapher-clerks, telephoner-clerks, telegrapher-car distributors, ticket clerk-telegraphers, telegrapher-switch-tenders, C.T.C. telegraphers, train and tower directors, towermen, levermen, block operators, staffmen, managers, wire chiefs, repeater chiefs, chief operators, printer mechanicians, telephone operators (except switchboard operators), teletype operators, printer operators, agents non-telegraphers, and agents non-telephoners herein listed.

"ARTICLE 2 — POSITIONS AND RATES OF PAY

Rule 5. General Telegraph Offices. (a) Positions and rates of pay in general telegraph offices under the jurisdiction of the Superintendent Telegraph shall be as follows:

* * *

4 Las Vegas 'VG'

Manager	2.127
2nd chief operator-printer machn.	1.995
3rd chief operator-printer mechn.	1.995
Telegrapher	1.851

* * *

(b) All hourly rated managers in telegraph offices listed in this rule, except Nampa, Seattle, Las Vegas, and Los Angeles 'ZO' will be assigned 8 a.m. to 5 p.m., with the meal period of one hour.

Rule 6. New Positions. The wages of new positions shall be in conformity with the wages of positions of similar kind or class in the seniority district where created."

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"ARTICLE 3 — TIME ALLOWANCES

Rule 10. Daily Guarantee. Regularly assigned employes will receive eight hours pay for each twenty-four hours, at rate of position occupied, if ready for service, or if required to be on duty less than eight hours, except on rest days and holidays."

"ARTICLE 4 — HOURS OF SERVICE AND OVERTIME

Rule 20. Basic Day. Except as provided in Rule 21, eight consecutive hours, exclusive of the meal period, shall consitute a day's work, except that where two or more shifts are worked eight consecutive hours with no allowance for meals, shall constitute a day's work."

"ARTICLE 6 — SENIORITY

Rule 31. Seniority Date. (a) Employes will be accorded a seniority date upon completion of ninety days continuous service, or ninety days continuous assignment assignment to the extra board; seniority to date from date such continuous service or assignment commenced in the seniority district in which it accrued.

* * *

Rule 34. Bulletined Positions. (a) Positions or vacancies (except as provided in Rule 35), will be bulletined on bulletin boards accessible to all employes in the seniority district on bulletins dated and issued as of the first and sixteenth of each month. Bulletins will be numbered consecutively from the first of each year. Copy of bulletins will be furnished local chairmen.

* * *

Rule 38. Bulletined Positions — Assignments. (a) Successful applicants for positions shown on bulletins posted in accordance with Rule 37 will be promptly advised by wire of their assignment, with copy to the local chairman. Employes assigned to positions included on bulletin of the first of the month must take the position on or before the first day of the succeeding month, and employes assigned to positions included on bulletin of the sixteenth of the month on or before the sixteenth day of the succeeding month, unless leave of absence is granted with the approval of the superintendent and local chairman. Assignments to positions will be shown on next regular bulletin issued in accordance with Rule 34.

(b) Where it is not practicable for the company to place an employe on bulletined position to which assigned within the time limit prescribed in Section (a) of this rule, he will be paid the higher rate of the two positions and any additional personal expenses incurred for the period withheld from new assignment beyond the time limit prescribed in Section (a) of this rule. Rule 11 will not apply, neither will the employe have any claim for guarantee of new assignment.

* * *

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Rule 47. Promotion. (a) Promotion shall be based on seniority and qualifications; qualifications being sufficient, seniority will prevail.

(b) Employes will be given full cooperation in their efforts to qualify for positions on which they have not had previous training and experience. General chairman will confer with general managers and superintendent telegraph on affording employes included within the scope of this agreement an opportunity to qualify for such positions.

* * *

Rule 52. Extra Boards. (a) Extra boards regulated by the superintendents will be maintained on each chief train dispatcher's district, except that only one extra board will be maintained in the Los Angeles chief train dispatcher's office to cover both the Los Angeles and Las Vegas chief train dispatchers' districts. Lists will be posted in chief train dispatchers' offices showing name and standing of employes assigned to extra boards. Extra employes may establish headquarters at any point on the chief train dispatcher's district.

* * *

(c) Extra employes will be permitted to qualify for positions of printer operator, teletype operator, towerman or leverman at their own convenience."

"ARTICLE 8 — GENERAL

Rule 62. Train Orders. No employe other than covered by this schedule and train dispatchers will be permitted to handle train orders at telegraph or telephone offices where an operator is employed, and is available, or can be promptly located, except in an emergency, in which case the telegrapher will be paid for the call.

* * *

Rule 70. Date Effective and Change. This agreement will be effective as of January 1, 1952, and shall continue in effect until it is changed as provided herein, or under the provisions of the Railway Labor Act.

Should either of the parties to this agreement desire to revise these rules, thirty days' written advance notice, containing the proposed changes shall be given, and conference shall be held immediately on the expiration of said notice unless another date is mutually agreed upon."

* * *

In accordance with the provisions of the above listed effective rules of the contract extant between the parties to this dispute, the Organization avers:

1. That the Scope Rule (Article 1, Rule 1) gives to telegraph service employes the right to perform the work of handling all

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communications service of record whether performed by telegraph, telephone, teletype, printer perforator, and any other communication device or machine. Under this Scope Rule any and all railroad communication work of record basically belongs to a telegraph service employe.

2. Article 2, Rule 5, clearly indicates that telegraph service positions have been negotiated into the agreement and made a part thereof at Las Vegas, conclusively proving that the Carrier has recognized through collective bargaining that the work of handling communications service of record belongs to telegraphers at Las Vegas.

3. Article 3, Rule 10, is the daily guarantee rule which requires that regular assigned employes will receive a full day's pay of eight hours, five days a week, if ready for service. Telegraph service employes are ready for service and should be regularly assigned to perform the work involved in this claim at West End Yard Office, Las Vegas.

4. Article 4, Rule 20, is the Basic Day Rule, it provides that eight consecutive hours shall constitute a day's work. The Organization contends that based on the work that the Carrier has taken away from telegraph service employes commencing at the time that the new West End Yard office at Las Vegas opened, that telegraph service employes are being deprived of eight hours' work each day on each shift and that the senior idle employe or employes are entitled to payment for work denied.

5. Article 6, Rule 31(a), concerns the establishing of seniority under the Telegraphers' Agreement. Seniority is a valuable property right to telegraph service employes and the right to perform work contracted to such employes is highly important. When such employes are unilaterally deprived of work which should be assigned to these employes they have a justified claim against the Carrier.

6. Article 6, Rule 34(a), provides for the advertising of positions or vacancies to the employes in the classes covering the work historically and traditionally belonging to our craft.

7. Article 6, Rule 38, explains how bulletined positions are to be assigned, and if the employes are not placed on such positions it indicates how penalty payments must be made. The Organization holds that the proper number of telegrapher positions at the new Yard Office, West End Yard at Las Vegas, should have been bulletined to telegraph service employes and assigned to them in accordance with these rules. Since the Carrier did not comply with the requirements under the rules, then it is liable for the penalty payment claimed.

8. Article 6, Rule 47, provides that telegraph service employes will be promoted and will be trained and given an opportunity to become qualified on any position. The Carrier in this claim, denied the employes here involved the right to become qualified

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and to perform the work to which their seniority and scope coverage assigned to them.

9. Article 6, Rule 52, provides that extra employes will be permitted to qualify for positions of printer operator, teletype operator positions and be used to fill such positions when vacancies occur. The Carrier has refused to permit extra telegraphers to qualify or to work at Las Vegas West End Yard office to perform the communications work handled by the printer or teletype machines.

10. Article 8, Rule 62, is the Train Order Rule which we spoke about earlier in this brief. It definitely provides that only telegraph service employes and train dispatchers, will "handle" train orders, and that includes the personal delivery of such train orders as ruled by your Board in the numerous awards previously cited and quoted in this case.

11. Article 8, Rule 70 is the concluding rule of the contract. It provides that the only manner in which this Agreement can be changed is under the provisions of the Railway Labor Act, which means that if the Carrier desired to make the changes it unilaterally put into effect at West End Yard, Las Vegas, it was required to serve proper notice on the Organization of the desired changes and conduct conferences and negotiations to properly dispose of the question. Since the Carrier has failed to comply with this rule it is acting in breach of the Railway Labor Act as well as the rules of this contract.

As the Scope Rule (Article 1, Rule 1) is the important rule which provides the basis for all the other rules of the Agreement and is the central and controlling statement of the intent of the parties to the agreement with respect to the work covered by the classes shown therein, the Organization here wishes to again stress its importance in this case. The Scope Rule is the rule about which the other rules revolve, and upon which they are founded and dependent. As its name signifies, it stipulates the SCOPE — COVERAGE of the Agreement, and contains the subject matter of the instrument as pronounced that the parties have agreed that the provisions of this agreement "will govern the wages and working conditions" of the employes in the classes specified in the scope rule; its very intent and purpose is to protect the employes in whose behalf it was made against encroachment by those not subject to its terms. It is meant to cover work of the classes specified therein and it is essential to the protection of employes, and the Organization of which such employes are a part. As your Board said in Award 1501, "A competent and fully qualified Organization cannot be maintained if parts of its work are to be chiselled off and given to other crafts." Your Board has heretofore passed judgment in Scope Rule disputes — scores of them — and has consistently held to the principle that work of a class covered by an agreement belongs exclusively to the employes in whose behalf it was made and cannot be delegated to others without violating that agreement.

Seniority and work under collective agreements such as here in evidence, have been recognized and held to constitute a valuable property right, the preservation of which every employe on the roster has a direct interest. See Awards 2616 and 5133. When work opportunities are withheld from

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employes they are deprived of their rights specifically and definitely reserved to them by the Agreement. In Award No. 1169 your Board said:

> "The purpose of the agreement was to assure to telegraphers employed by Carriers the full fruits of their employment. Award 86. The gist of our present holding is, and the spirit of all our holdings on the question involved has been, to give recognition to the reasonable meaning of the agreement, into which the carrier, no less than the employes competently entered."

The logic of this statement is applicable to the present case which involves deprivation of the exercise of seniority rights to the employes which the agreement intended that they should have. The value of seniority is represented in work opportunity accorded the employes in the order of their standing on the roster. Seniority would be meaningless without positions (work). Each position enhances the value of seniority while each position abolished or withheld devalues seniority. Every employe on the roster has an equity in the positions embraced within the fixed seniority district. The number of positions and the amount of work available determines the worth of seniority. Years of service mean nothing unless the opportunity to apply the value of that service is afforded on a seniority basis. Seniority is the thing that stabilizes employment in the railroad industry and the Carrier reaps the benefits of it as well as the employes.

That is why the courts of our land, and your Board as well, have given to seniority and work such great significance. That factor is present in this case and the impact of the Carrier's action must here be seriously considered in that light.

When the Railway Labor Act was first enacted by Congress on May 20, 1926, it provided in Section 2, First:

> "It shall be the duty of all carriers, their officers, agents, and employes to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes * * *."

To upset or overturn the arrangements and agreement between the Carrier and the Telegraphers, and assigning any part of this work here involved to employes not covered by the Telegraphers' Agreement, would violate the mandatory provisions of a Federal Law under Section 2, First, of the Railway Labor Act. This duty to "exert every reasonable effort to make and maintain agreements * * *" is not a one-sided obligation. It applies to Carriers and employes alike. An agreement is not maintained if one of the signatories to the agreement acting unilaterally effects a revision causing the agreement to decline for lack of support once openly agreed upon. Your Board said in Award 2611:

> "* * * it was as much the duty of the carrier to conform to the current agreement as it was that of the employe and his organization to protest a violation thereof, and it would be inequitable to permit the carrier to reap a benefit from its own wrong."

We feel that it is important to briefly review the history of the telegraph based on the historical tradition of railroad telegraphers on the railroads performing this service, particularly with respect to craft jurisdiction. The old semaphore method of transmitting intelligence with semaphores

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placed within vision was termed telegraph, as is the modern electrical variations either by the use of wire or without wire. The heliograph as used in World War I by telegraph battalions was properly referred to as telegraph. It is not accurate, therefore, to say that telegraph refers only to Morse telegraph. The first communication service inaugurated by railroads was Morse telegraph, then came the telephone, the printing telegraph (various trade names, such as printer, printing machines and teletype) and radio; the radio's use is limited with respect to communications of record. By tradition the appellation "telegrapher" or "operator" has been given to any person who operates the telegraph, the telephone, the printing telegraph, or the radio.

Lexicographers define "a telegrapher" as "one who telegraphs." "Telegraph" is defined by Webster as:

> "An apparatus for communication at a distance by means of preconcerted signals; in the broadest sense an apparatus or system for communication at a distance other than the ordinary ones of speech and letter writing."

The Encyclopedia Americanna, 1945 edition, tells us —

> "The word 'telegraph' is derived from the Greek 'tele' — 'afar off' and 'graph' 'to write.' In its broad sense it has been used to designate any means by which intelligence is transmitted to a distance by signs or sounds but in modern times its use has been to describe the electrical transmission of written or printed communications."

The automatic or printing telegraph is one of the more recent developments in the light of the fact that some form of telegraph has existed for several hundred years and that the electrical telegraph systems have been in use for more than one hundred years. The Encyclopedia Brittanica, a 1947 edition, tells us "the classification of automatic telegraph may broadly include all systems in which signals are transmitted by machine methods and automatically recorded."

The use of automatic telegraph or mechanical message machine, in railroad work began about 1915 and the upward surge in improving, installing and using these machines dates from about 1927, and the use of automatic telegraph (printing telegraph machines) is rapidly increasing. Therefore, it is clear, notwithstanding any allegations to the contrary, that the functions of the printing telegraph machines and similar devices have supplanted the telegraph and the telephone for communication service. This being so, such machines and devices are squarely placed within the confines of the accepted definition of the word "telegraph."

The printing telegraph has a history, of course. It is said the first machine was invented in 1855, but except for historical purpose that is unimportant. The modern day printing telegraph made its appearance with the Western Union Telegraph Company around 1918 — with a trade name of Barclay. Since that time trade names have changed, e.g., the Western Electric Multiplex, the Morkrum, etc. But the five unit code developed as early as 1875 is exactly the code that is used in the present modern day printing telegraph machines. The morkrum is the predecessor of the present teletype or mechanical message machine and this machine is used quite extensively on many railroads.

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There are various types, models and kinds; in principle, however, all are the same. Printing telegraph machines are used in several categories, however the most common are: (1) perforation (punching) of tape, which tape simultaneously passes through a transmitter and transmits a telegraphic communication, (2) the same as category (1) except by depressing the keys on a keyboard — similar to the keyboard on a typewriter — the electrical variations become active and a telegraphic communication is transmitted. Tape perforation is not involved here but the transmission of communications is the same principle as when tape is used. Category (2) type of printing machine is involved in the instant proceeding and is known by the trade name of "teletype." The receiving side of the instant operation is identical to the receiving side of all other types of printing telegraph machines. The ultimate result of the operation of any and all printing telegraph machines is the dispatching of messages, reports, etc., from one location to another by telegraph. There can be no mistake about that! The Organization holds, by virtue of history, practice and contract the operation of any machine which leads to and completes a communication of record, is telegraph operation and that such operation is covered by the Telegraphers' Agreement. A parallel situation exists where diesels are substituted for steam locomotives, electric tamping machines are substituted for hand tamping of crossties, etc.

Without fear of contradiction the Organization asserts, and it is generally agreed, that the use of printing telegraph machines is in leiu of Morse telegraph or telephone — as the telephone is frequently used in lieu of Morse telegraph. As far back as 1919 when only a few printing telegraph machines were in operation on the railroads, the question of jurisdiction arose. The United States Railroad Administration on April 30, 1919, by its Interpretation No. 4 to Supplement No. 13 to General Order No. 27 very definitely and properly disposed of the issue. We quote from that Interpretation:

> "Question 5. — Do the following classes of employes come within the provisions of Supplement No. 13, and shall such positions be incorporated into existing agreements and into agreements which may be reached in the future on the several railroads?"
>
> * * * * *
>
> (e) Employes whose duties require transmitting and/or receiving messages, orders, and or reports of record by telephone between various railroad offices in the same city or district in lieu of telegraph?
>
> Decision. — Yes, the use of the telephone to transmit or receive messages, orders, or reports of record in lieu of the telegraph carries to the position the provisions of Supplement No. 13."
>
> * * * * *
>
> (g) Operators of mechanical telegraph machines used for receiving and transmitting messages?
>
> Decision. — Yes."

Decision No. 2374, of the United States Railroad Labor Board, dated April 14, 1924, hewed to the line established by the United States Rail-

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road Administration. The Railroad in that proceeding had its day in court. The Dissenting Opinion of Board Member Baker, a Carrier representative, reads:

> "The operation of automatic printers does not require in the slightest way knowledge of Morse, Continental, Phillips, or any other telegraphic code, yet the decision not only fixes that these devices, wherever used, must be manned by telegraphers, but by its language also fixes that if any of the present automatic-printer operatives are not telegraphers, they must, irrespective of length of service or capability be set out to make room for one of the newly created, preferential class."

The National Railroad Adjustment Board, Third Division, created by the Railway Labor Act of June 21, 1934, and successor to the United States Railroad Labor Board, in its Award No. 864, dated June 20, 1939, dealing with teletype (a mechanical telegraph message machine with a trade name) operation stayed well within the pattern. For ready reference the Organization's Statement of Claim in that case is quoted in full and in addition excerpts from the Opinion of Board:

CLAIM

> "Claim of the General Committee of The Order of Railroad Telegraphers on the Denver and Rio Grande Western Railroad, that the hourly rate of pay established through negotiations and agreement for telegraphers in the several offices on the system likewise applies to employes who operate teletype machines in communication service in lieu of the telegraph in offices where teletypes are installed, and employes who operate teletype machines shall receive the negotiated telegraph rate in the office where such service is performed, and that: Since the installation of these teletype machines in certain offices employes receive and transmit by teletype mechanical devices instead of Morse mechanical devices, business of the office or offices in question and the same result is obtained by the use of either mechanical device, that all such employes in said office or offices who have received a lower rate of pay for the time occupied in teletype service than that negotiated and fixed by agreement for telegraph service, shall be reimbursed the difference between the negotiated telegraph schedule rate and the arbitrary rate fixed by unilateral action of the management for teletype service, retroactive to the date teletype service was inaugurated in the office or offices involved in this dispute."

OPINION

> "* * * Carrier, however, taking the position that the work was not covered by the prevailing agreement, did not give the notice specified in Rule 35 applicable to proposed changes in the Agreement.
>
> * * * The Brotherhood contends the work is covered by the Agreement and the claim is for the difference in this rate of pay, so established by Carrier, and that fixed by the Agreement for telegraphers in such offices. It should be observed that no jurisdictional dispute is involved in this case.
>
> * * *

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"The Board is of the opinion that the work is covered by the agreement and that it has jurisdiction over the dispute. The agreement is clearly applicable to certain character of work and not merely to the method of performing it. To hold otherwise would operate to destroy collective bargaining agreements. Improved methods have no more effect upon such agreements than such agreements have upon the right of the Carrier to install such methods. Certainly no one would question the right of carriers to make improvements in methods of performing work and we think it is equally true that improved methods do not operate to take the work out from under contracts with employes performing same. **The teletype is simply a new and improved mechanical device used for the performance of the same work theretofore performed by the use of Morse instruments."** (Emphasis added.)

Then comes a Board of Arbitration, another legally constituted tribunal, in Case A-1023, Arb-20, dated January 14, 1943, (ORT vs CRI&P) with the following statement:

"Printer operators and Morse operators are covered by the Telegraphers' Agreement of January 1, 1928, are engaged in the communications service of the carrier and transmit and receive messages and reports of record.

In performing telegraph work Printer operators use a mechanical device called a printer machine and Morse operators use an instrument known as the Morse Telegraph. * * *

* * * It will be observed that the printer machines are referred to as telegraph printing machines and the operators referred to as telegraph printing machine operators.

* * * It clearly appears from the record that many more messages can be and are sent within a given time by telegraph printing machines, than are or can be sent by the Morse telegraph instrument. A witness for the carrier testified that per eight-hour day in the Kansas City office, about 200 messages are sent and received by Morse operators and about 400 messages are sent and received by telegraph printer operators.

* * * The Carrier stresses the fact that a Morse operator must send and receive messages, while a message transmitted by a printer telegrapher is received automatically by the receiving instrument and it is not necessary for such operator to be present when the message is received. **But this result is due to the fact that the telegraph printer machines is an improved device for handling telegraph work.** The carrier installed the machines in 1929, because they would handle telegraph work more efficiently and economically than the Morse instruments. * * *

* * * The Carrier has not introduced evidence that tends to establish its contention that there is a 'vast difference' in the responsibilities of the respective operators. We perceive no substantial difference in their responsibilities. Each has the responsibility of skillfully and efficiently operating his instrument and of accurately transmitting and receiving messages and reports. Each is responsible for the work handled.

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The printer operator uses the improved device, furnished by the Carrier, to more efficiently and economically handle telegraph work performed by Morse operators before it was installed. The Morse and Printer operators in the same office use different types of telegraph instruments to perform the same kind of work. * * *

The importance of the work performed by printer operators, their duties and responsibilities, compare most favorably with the duties, responsibilities and importance of the work handled by Morse Operators." * * * (Emphasis added.)

Herein above the Organization has asserted with evidence in the form of decisions of the most competent authority that it has jurisdiction over communication service of record, whether that service is Morse telegraph, telephone, radio, printing telegraph, mechanical message machines, (I.B.M. or teletype) or any other apparatus which has for its purpose the transmitting or receiving of intelligence from one location to another. There is absolutely no difference in result of the work performed by either method; all are covered by the agreement specifically. Of the several score awards of the Third Division, National Railroad Adjustment Board, dealing with communcation service, excerpts from an illustrative number of them are reproduced here for the convenience of the Board:

Award No. 3902:

"The scope rule of the applicable Telegraphers' Agreement, insofar as it affects the present case, provides that the agreement applies to all telephone operators except switchboard operators. Rule 1, Agreement 1940. While our previous decisions hold that the use of the telephone in the transmission or reception of messages, orders, or reports of record is the work of the telegraphers, it is not the only work included within the Telegraphers' Agreement. In addition to telegraphers' work as traditionally defined, it includes, of course, all classifications of employes specifically negotiated therein whatever the nature of their work may be."

Award No. 4249:

"The Organization contends that the Agreement was violated when an employe not covered by the Telegraphers' Agreement was permitted to transmit a communication of record by telephone.

It has been determined by numerous awards of this Division that the transmitting or receiving of messages, orders or reports of record by telephone in lieu of telegraph constitutes work within the Telegraphers' Agreement and belongs to telegraphers exclusively. Awards 3199, 3397. The instructions sent by telephone in the present case fall within the class designated as 'messages, orders, or reports of record' and constituted work belonging to the telegraphers."

*** * * * ***

"The use now made of the telephone was not contemplated when the Agreements were made. When the Telegraphers' Agreement was first made, it was not contemplated that the telephone would largely supersede the telegraph. But on the other hand, work was

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reserved to the telegraphers and, if the contention now advanced by the Carrier were to obtain, the work of telegraphers would amount to little or nothing. In the absence of the negotiation of new Agreements to meet these fundamental changes brought about by the increased use of the telephone, this Board was called upon to interpret the Agreement in the light of these new conditions. In so doing it has been held by numerous awards of this Division that telegraphers did not fall heir to all telephone work because it largely supplanted the telegraph, but that a logical interpretation of the Agreement and the evident intent of the parties when the Agreement was made, was that the transmission of messages, orders or reports of record was the work of telegraphers whether transmitted by telegraph or telephone."

Award No. 4458:

"It is the rule, established by the decisions of this Board, that the use of the telephone in lieu of telegraph in communicating or receiving messages, orders or reports of record, is work belonging exclusively to Telegraphers. Awards 1983, 3114, 4280. The work here involved was clearly a report of record as that term is used in the established rule. The track supervisor, not being under the Telegraphers' Agreement, had no right to the work. The agent-telegrapher was available and should have been called. An affirmative award is in order."

Award No. 4516:

"The Scope Rule of the Telegraphers' Agreement does not purport to specify or describe the work encompassed within it. It sets forth the class of positions to which it is applicable. The traditional and customary work of those positions, generally speaking, constitutes the work falling within the Agreement. It cannot be disputed that the classes specified deal largely with communication service. Historically, communication service on the railroads was carried on largely by telegraph. In former days, a telegraph operator was required at every point where communication service was essential to the safe and efficient operation of the railroad. Basically, the telegraphers were then composed of the large group of Morse code operators required to operate the telegraphic system which afforded the Carrier its chief means of communication. **The advent of the telephone, mechanical telegraph machines, central traffic control systems, and other progressive methods of communication, has gradually reduced the work of the Morse code operator. This Board has sought to follow the communication work of the Morse code operator into the advanced methods of communication and preserve for him the work which traditionally belonged to him."** (Emphasis added.)

All of this proves that (1) the printing telegraph machines have been substituted for Morse telegraph or telephone; and (2) communications service of record, whether it be by Morse telegraph, telephone, radio, or printing telegraph, along with any auxiliary service is definitely covered by the Telegraphers' Agreement. Any other conclusion would not harmonize with the accepted interpretations, meaning, intent and rulings of the most highly recognized and generally accepted authority, including your Board,

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respecting the terms "telegraph" and "teletype operators" — "printer operators" and other classifications in the Scope Rule.

Award 5410 is a most outstanding award of your Board concerning the right of telegraph service employes to perform communications service similar to that here involved in this instant claim. Your Board before making the decision in Award 5410 analyzed this question from every angle and the Organization wishes to here respectfully incorporate the entire argument of the Organization and opinion of your Board as outlined in Award 5410 into the present case and make it part hereof. In Award 5410 we find your Board saying:

> "We are convinced that the term 'mechanical message machine operator', a generic term appearing in the Scope Rule, encompassed the operator of a teletype machine. Teletype is a trade name identifying one of several kinds of teletypewriters and because of the great strides being made in the art of transmission, it was good draftsmanship to use a broad, general term in setting forth the coverage of the Agreement, rather than to name a specific machine currently in vogue. Webster's New Collegiate Dictionary defines 'telegraph' as follows:
>
> > 'Originally an apparatus for communication at a distance by signals, now any apparatus, system or process for communication at a distance by electric transmission.'
>
> 'Telegram' is defined as 'a telegraphic dispatch.' Hence, the mechanical message machine operator, as used in this Agreement, can be said to describe a specialist within the general Telegraphers' classification, transmitting telegrams, messages, dispatches, etc.
>
> This Board in past awards has looked to the character of the work rather than the method of performing it when interpreting Scope Rules. See Awards 4516 and 864 in particular. The parties, it would seem, have removed any need to review past awards considering tradition, custom and practice in ascertaining the Scope of the Agreement. Coverage is spelled out in clear, unambiguous language here.
>
> * * *
>
> The carrier further contends that because telegraphers have never been used in Traffic offices, that the contract was never intended to cover such locations. In Award 2693 we held that it is the nature of the work and not the place of its performance which determines to whom the work belongs. Here the justification for the introduction of telegraphers into the Traffic Department first occurred when the mechanical message machine was installed in that office in 1947. The employe followed the work which the Agreement gave to him. This Agreement does not specify any certain place of performance in respect to non-local messages. If the parties intended to restrict use of mechanical message machine operators under the Telegraphers' Agreement to on-line points not within one terminal, the scope rule would have been the place to express the intent."

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The Order of Railroad Telegraphers, and the employes of this Carrier represented by it, has by custom, tradition, as well as by contract, the right to perform and handle the communications work here in question; the Carrier breaches that right when it assigns this work to be performed by employes of another craft.

In Award No. 2282, your Board said:

> "As this Division has often said, it is assumed that **Agreements are made to be kept.** Their strict enforcement may create isolated situations which make it seem unreasonable, if not absurd, to enforce them. **But it is the intergrity of Agreements that is at stake, and unreasonable results, in isolated cases do not justify us in ignoring their plain provisions.** * * * Agreements must be upheld, in order to maintain those stable and friendly relations between employe and Carrier which bargaining agreements and Boards of Adjustments, were and are designed to promote." (Emphasis added.)

And in Award No. 4747 we find this statement by your Board:

> "We feel obliged to point out again, as we have before, that agreements are made to be kept and when, as here, the rights of an employe are prejudiced by their violation, it is the function of this Board to award the relief required."

The Organization submits that, in view of the evidence and opinions of competent legal authority herein cited, the action of the carrier in permitting or requiring employes not under the Agreement, to handle train orders, clearance cards and transmit and receive communications of record at Las Vegas West End Yard office, which work was formerly handled by telegraph service employes, constitutes a violation of the agreement.

The Order of Railroad Telegraphers has contracted to perform the work here involved and the principle upon which this dispute stands has been decided by your Board in favor of the employes in many previous awards. What the Carrier in fact undertakes to say in this issue is that it is privileged to use employes not under the Telegraphers' Agreement to perform work clearly covered by the Telegraphers' Scope. In truth and in fact all this was and is, a part of work contracted by the parties to telegraphers and definitely and positively is covered by the agreement extant between the parties.

The Scope Rule is understood by the parties to prohibit employes on positions in classes of service not under the Agreement from performing service covered by the Agreement, unless the position of such employe is brought within the scope of the Agreement.

All of the work in connection with an agreed classification is work covered by the Agreement by virtue of the seniority and other rules in the Agreement.

In conclusion, the Organization submits:

1. The records, facts, circumstances and rules cited clearly discloses that the work in question is work covered by the provisions of the Telegraphers' Agreement.

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2. The employes covered by the Telegraphers' Agreement have the contractual right secured to them by the Agreement and its signed rules to exclusively perform all work which is identical with the work covered by the scope of the Agreement.

3. The Carrier permitted and continues to permit employes not under the Telegraphers' Agreement to perform the work in question at Las Vegas in violation of the rules of the Agreement.

4. It is evident and conclusive that the Carrier, acting alone, removed work from the Telegraphers' Agreement and assigned such work to others not covered by the Agreement, attempting to get around contractual requirements of the signed rules of the Agreement.

5. Employes coming under the Telegraphers' Agreement are being denied their contractual right to perform the service here involved and are entitled to be compensated for this work which they have been improperly deprived since August 25, 1952.

6. The rules quoted, as well as the awards cited, clearly show that the Carrier is violating the Agreement between the parties.

7. A sustaining award is necessary to reaffirm the rights of the telegraph service employes to perform work properly belonging to such employes.

CARRIER'S STATEMENT OF FACTS: Prior to setting forth or entering into a discussion of the factual situations around which this dispute centers, it will be helpful to point out the nature of the claims presented by the Organization which are in three parts.

The third part of the Statement of Claim, paragraph (c), merely specifies the alleged measure of damages which the Organization seeks to recover. It is premised on two separate and distinct factual situations described by the Organization in paragraphs (a) and (b) of the Statement of Claim. Neither of these situations bears any relationship to the other. Consequently, they should be reviewed separately.

The Carrier's Statement of Facts and its Position with respect to each of these situations will be presented accordingly.

CLAIM (a): The dispute involved in paragraph (a) of the claim pertains to the Carrier's method of handling train orders for westbound freight trains leaving Las Vegas, Nevada.

To handle the increased business originating in the area, the Carrier, early in 1952, began a program of construction and expansion designed to improve the freight train yard facilities at Las Vegas. Existing yard tracks were extended westward, and the operations were adjusted so that the hub of activity centered at the west end of the yard, instead of at the east end where the passenger station is located and where heavy passenger traffic made the freight train yard switching movements with yard engines undesirable.

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To accommodate supervisors and employes engaged in the handling of the various functions connected with the operation of the yard, a new yard office was constructed within the terminal, at the west end of the classification yard, approximately one mile west of the passenger station. This facility has since been known and will hereinafter be referred to as the "West End Yard Office."

The telegraph office at Las Vegas is located in the passenger station. The telegraph office in turn is linked with other offices located in other buildings within the terminal by a system of underground pneumatic tubes. Using a compressed air principle, messages, letters, waybills, etc. may be placed in a carrier and sent from one point to another through the tube.

On August 25, 1952, the Carrier moved its yard office forces from the old yard office to the West End Yard Office. The change did not affect the telegraph office, which remained in the same location at the passenger station. No change in force occurred as a result of moving the yard force from the old yard office to the West End Yard Office.

The pneumatic tube connecting the old yard office with the telegraph office was removed and a new tube installed, connecting the telegraph office with the West End Yard Office. Telegraphers at the passenger station continued to handle exactly the same functions as before.

In this part of the claim we are concerned only with the handling of train orders.

Trains departing from Las Vegas, both east and west bound, are governed by Centralized Traffic Control. This system of train operation, becoming more general in its use, eliminates the need for train orders, except orders specifying restricted speed due to track and roadway conditions.

Where such systems are in operation, trains move, with respect to each other, strictly by signal indications. The only occasion for the use of train orders in such territories arises when a train is to leave the track controlled by the circuit for movement on to a branch line, or where "slow orders" requiring a reduction in the speed authorized over certain portions of the track under repairs are placed. Occasionally, orders are placed advising the train crew of the presence of unusually high or wide loads in the train.

Because of the Centralized Traffic Control operation, the train orders issued to trains at Las Vegas are extremely limited (many trains receive no orders whatever) in comparison to train orders issued in territories where trains are operated by train orders, and such train orders as are issued at Las Vegas pertain only to unusual track conditions, as heretofore noted.

Prior to August 25, 1952, trains were made up for departure from the east end of the Las Vegas yard, using a lead almost directly in front of the passenger station. Conductors received their waybills at the old yard office, reported for duty and were relieved from duty at the passenger station.

Whenever train orders were necessary, they were copied by the telegraphers at the telegraph office in the passenger station, and were received by the conductors at that point.

Subsequent to August 25, 1952, trains for departure have been made up at the west end of the yard. When train orders are necessary for trains

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leaving Las Vegas, they are copied by the telegraphers at the telegraph office in the passenger station. Train orders for eastbound trains are delivered to the conductor at the passenger station. He then boards the train as it passes the passenger station.

For westbound trains which do not pass the passenger station, train orders are copied by the telegrapher at the passenger station, exactly as before. The telegrapher then places the orders in a carrier, which he inserts in the pneumatic tube. The orders are then received by the conductor at the West End Yard Office.

The conductors' register room at the West End Yard Office is approximately twelve feet from the pneumatic tube terminal. Conductors in some instances receive the carrier and remove the train orders from it. There have been instances, however, where the carrier also contained in addition to train orders, messages, letters, waybills, etc. used in the transaction of the business at the yard office, received from other offices.

In such instances, one of the yard clerks removes the entire contents from the carrier, segregating the items for yard office use from the train orders. The train orders are then placed on the counter, where they are picked up by the conductor. It is with respect to the latter process that the Organization complains.

CLAIM (b): The dispute presented in paragraph (b) of the claim is in no manner associated with the handling of train orders. It relates to an entirely different feature.

Claim (b) arises out of the Carrier's installation of machines developed by the International Business Machines Corporation (referred to hereinafter as "IBM machines"), to handle the preparation of wheel reports, consists, manifest and manifest passing reports, and other clerical statements and records at Las Vegas which were formerly prepared and handled manually by clerical employes at the yard office.

The Car Record Bureau at Las Vegas, located in the West End Yard Office, employs the following machines:

(1) ONE IBM ALPHABETICAL KEY PUNCH MACHINE

These machines punch holes in a card to correspond with information to be used by associated equipment to achieve various results in subsequent operations.

The holes are cut by the machine manually, by an operator using a keyboard similar to a typewriter keyboard.

The work performed by the key punch operator is the same as the work performed by a typist, except that where the typist produces the information on a typewritten page, the key punch operator transfers the information to a punched card.

The operation of the alphabetical key punch is a manual operation; that is to say, the result achieved by the machine, i.e., a punched card, occurs as a result of manipulation of the device by human hands.

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(2) TWO IBM TAPE CONTROLLED CARD PUNCH MACHINES

This machine produces the same result as the alphabetical key punch, i.e. a punched card containing certain information.

The machine is activated by electrical impulse from a series of codes on a punched tape. When the tape is fed into the machine it automatically punches cards to correspond with the information on the tape.

The tape controlled card punch machine differs from the alphabetical key punch in the respect that its operation is completely automatic.

(3) TWO IBM CARD CONTROLLED TAPE MACHINES

This machine using punch cards punches the tape referred to in (2) above.

The punched cards are placed in the machine and the switch turned on. The cards then feed automatically through the machine, producing the punched tape.

The machine is completely automatic — the result which it achieves requires no human activation; it occurs entirely as a result of electrical impulse induced by holes in the punched cards.

(4) ONE IBM SORTER MACHINE

The function of this machine is to segregate the punched cards into different classifications so that the information desired may be secured by inserting the cards in any particular classification into some other machine.

The sorting technique is automatic. It makes possible the immediate grouping and listing of cars by railroad, by type, by series, etc.

(5) ONE ALPHABETICAL ACCOUNTING MACHINE

This machine, in the same manner as the others, is completely automatic and is activated by punched cards. When the punched cards feed through the machine, the information represented by the holes punched in the cards is printed on a form.

The machine is used primarily for compiling the wheel report, formerly typewritten; although by changing the panel, switch lists, lists of certain types of cars handled or any special report required by the company covering car handling may be secured.

(6) ONE IBM ALPHABETICAL INTERPRETER

Since it would be impractical for the employes engaged in the car handling processes to interpret the information on the

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cards merely from the holes punched, the cards are fed through the "interpreter." The result is the printing across the top of the cards of the information represented by the holes in the cards.

This machine is automatic in operation.

(7) **TELETYPE MACHINES:** This auxiliary equipment functions completely automatically in conjunction with the car handling system. For the receipt and distribution of information used in the car record processes, two teletype receiving printers and one teletype transmitter have been installed adjacent to the Car Record Bureau. Attached to the receiving printers are two teletype reperforators.

The teletype receiving printer is activated by electrical impulse imposed automatically at some distant point. At the receiving point it produces information on a printed page. Using the same impulses, and simultaneously to the printing of the information on paper, the reperforator punches a tape on which information corresponding to that shown on the printed page is reproduced.

The tape produced by the reperforator is then used to produce punched cards by the process described in Item (2) above.

The teletype transmitters operate in the same manner: The tape produced electrically from cards by the process described in Item (3) is inserted in the teletype transmitter. Electrical impulses imposed by the code on the tape activate the teletype transmitter. The machine produces a printed copy of the information contained on the tape and at the same time reproduces the same information on a receiver at some distant point.

A reperforator at the distant point of reception duplicates the information on a tape and the entire procedure is repeated.

The Car Record Bureau is staffed by clerical employes as follows:

8:00 AM to 4:00 PM

1 Chief Clerk
1 Head Machine Operator
1 Machine Operator

4:00 PM to 12:00 MN

1 Head Machine Operator
1 Machine Operator

12:00 MN to 8:00 AM

1 Head Machine Operator
1 Machine Operator

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The machines involved in the car record process at Las Vegas, the work functions performed by the employes at Las Vegas in connection with the machines and the results achieved are identical in every detail to the machines used, work functions performed and results achieved in the same operations at the Carrier's North Yard Office at Salt Lake City.

In another submission on file with this Division, involving the use of IBM machines to handle car record procedures at its Salt Lake City North Yard Office, the Carrier has explained in minute detail the operation of the machines involved, the work functions performed by employes incident to their operation, and the nature of the work involved.

The procedure at Las Vegas is in all respect identical.

To avoid unnecessary repetition, the Board is invited to again review the Carrier's Statement of Facts in the Submission in the dispute between the same parties involving car record procedures at Salt Lake City North Yard, wherein a complete detail of the facts upon which the Organization's Claim (b) is based is set forth. That material is incorporated by reference in this submission.

In a letter dated October 20, 1952, written by General Chairman Herrera to Assistant to Vice President F. C. Wood, claims based on the circumstances set forth above were filed with the Carrier, wherein it was alleged that —

> "A condition exists at Las Vegas wherein employes not embraced by the terms of the Telegraphers' Agreement are delivering train orders and clearance cards direct to train crews. This is in violation of the Scope Rule and Rule 62 of the Telegraphers' Agreement."

A copy of General Chairman Herrera's letter of October 20, 1952, is attached, identified as "Carrier's Exhibit A."

A conference between the parties was held at Salt Lake City November 6, 1952 to discuss the claims submitted by the Organization. The parties were unable to reach a satisfactory basis for disposition, and the Organization's claim involving the handling of train orders was denied by the Assistant to Vice President for reasons set forth in his letter of November 17, 1952 to General Chairman Herrera, copy attached, identified as "Carrier's Exhibit B."

On November 21, 1952, the General Chairman in a letter written on that date, copy attached, identified as "Carrier's Exhibit C," informed Assistant to Vice President Wood that his decision rendered on the claim involving the handling of train orders was not satisfactory to the Organization, indicating that the claim would be progressed further under the Railway Labor Act.

On December 5, 1952, the Assistant to Vice President was informed by General Chairman Herrera in a letter written on that date, copy attached, identified as "Carrier's Exhibit D," that the Organization's claim involving the handling of train orders at Las Vegas and its claim involving the use of IBM machines to handle car record information at Las Vegas would be further progressed as one dispute.

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In addition to the assertions made by the General Chairman in his letter of October 20, 1952 (Carrier's Exhibit A) pertaining to the handling of train orders, the Organization contended —

> "Effective October 5, 1952, the Telegraphers' Agreement has been further violated at the Las Vegas west end yard office by permitting or requiring clerical employes to transmit and receive consists of trains, manifest reports and other communications of record by means of teletype machines, transmitters and other mechanical telegraph machines, work which is clearly reserved to telegraphers by the Scope Rule of our Agreement."

The claim of the Organization which relates to the use of IBM machines to handle car record information at Las Vegas was also discussed by the parties in the conference held at Salt Lake City November 6, 1952, in conjunction with a claim submitted by the Organization covering the same system at the Salt Lake City North Yard and wherein similar contentions had been advanced.

Following the conference, the claim of the Organization involving the use of IBM machines at Las Vegas was denied for reasons set forth in a letter dated November 10, 1952, written by Assistant to Vice President Wood to General Chairman Herrera (The claim involving the same operation at Salt Lake City North Yard was denied in the same letter), a copy of which is attached, identified as "Carrier's Exhibit E."

Subsequently, arrangements were made for a study of the IBM operations at Las Vegas to be undertaken jointly by representatives of the Carrier and the Organization, and this study was made on February 24, 1952 by Assistant to Vice President Wood and Local Chairman J. W. Parker, representing the Organization.

The survey confirmed —

1. The handling of train orders for westbound freight trains leaving Las Vegas in the manner described herein; and

2. The use of IBM machines by clerical employes to handle reports and records formerly prepared manually by them in longhand or by use of typewriters.

POSITION OF CARRIER:

I. Unless notice is given to interested parties, the National Railroad Adjustment Board is without jurisdiction to hear and determine the portion of this dispute covered by Paragraph (b) of the Statement of Claim.

The dispute presented by Paragraph (b) originated with the Carrier's adoption of a new and modern system of handling car record information in the West End Yard Office at Las Vegas. Both the new method and the old one it supplanted have been detailed in the Statement of Facts.

The new method provides for the handling by mechanical media many of the common yard office procedures formerly performed manually by clerical employes. It also eliminates much of the manual handling of the

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procedures brought under mechanization. This was its purpose — to provide for a more efficient operation.

Discussions and handling of this case on the property indicate the Organization's claim does not have its source in the process itself. The Carrier does not understand the contention of the Organization to be that telegraphers should be provided to perform new work originating with the institution of the process or that telegraphers should be provided to perform manually those functions which are now handled automatically by the I.B.M. machines.

It is evidently clear that the claim is based upon the actual performance of work, i.e., **the remaining work functions which could not be mechanized and which remain to be performed manually by the Carrier's employes.** The question then is apparently concerned with the Carrier's method of assigning the work involved. The Organization **claims the right to replace the clerical employes now engaged in the manual performance of certain work at the West End Yard Office at Las Vegas with employes covered by the Telegraphers' Agreement.** To sustain this position, the Telegraphers' Organization must necessarily and does lay claim to the exclusive right to perform certain clerical work presently being performed (and properly) by clerical employes who are represented by the Clerks' Organization.

It cannot be effectively denied that for this Board to sustain the claims here presented —

(a) would be to deny these clerical employes their rights to this service;

(b) would abrogate the agreement negotiated between the carrier and the Clerks' Organization, and

(c) would seriously affect, by such action, the rights of the clerical employes and the Clerks' Organization.

For all of these things to occur without this Board giving the requisite notice to the affected or involved employes is clearly unlawful. Certainly it is not in accord with the Railway Labor Act. Section 3(j) of the Act provides:

"Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employees and the carrier or carriers involved in any dispute submitted to them."

In construing Section 3(j) of the Railway Labor Act, the Courts have steadfastly held that awards rendered by the various Divisions of the National Railroad Adjustment Board are void and of no effect where notice required thereby to interested parties has not been given and where such interested parties have not been given an opportunity to be heard.

On April 20, 1942, the First Division, National Railroad Adjustment Board, rendered **Award No. 6640** sustaining the contention of the Brotherhood of Railroad Trainmen that work which had been traditionally performed by train porters should be transferred to brakemen. In **Hunter v. A.T.& S.F.**

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Ry. Co., 78 F. Supp. 984, the District Court enjoined the enforcement of First Division Award 6640 and held that it was:

> "* * * void because it was rendered without notice to plaintiffs who were involved in the subject matter thereof, within the meaning of the Railway Labor Act, Section 3 (j) and because the proceedings conducted by the said Board preliminary to issuing the Award were outside the presence of the plaintiffs, who were not given an opportunity to be heard or represented before the Board; * * *. Compliance with Award No. 6640 will deprive plaintiffs of their property rights without due process of law in violation of the 5th Amendment of the Federal Constitution."

The Court of Appeals for the Seventh Circuit affirmed the District Court in 171 F. (2d) 594. In a subsequent opinion in this case, 188 F. (2d) 294, the Court of Appeals, in dealing with the question of "involved" employes before the Board, said at pages 300-301:

> "In spite of adverse court rulings the Adjustment Board apparently persists in the practice of giving notice only to the named parties to a proceeding. In many cases such a notice is insufficient. We so held on the previous appeal of this case. * * * To say that the train porters are not involved in a dispute which may result in brakemen supplanting them in their jobs is so unrealistic as to be absurd. Surely the employee who has a certain job is as much interested in that job as another employee who is trying to take it away from him."

In Templeton vs. A.T.& S.F.Ry.Co., et al, 84 F. Supp. 162 First Division Awards Nos. 6635, 6636, 6637, 6638 and 6639 were held to be:

> "* * * illegal and void, in that they were rendered by said Board, in violation of Section 3 (j) (Title 45 USCA 153 (j) of the Railway Labor Act, because plaintiff and the members of the class whom he represents involved in said proceedings, were given no notice thereof, or afforded an opportunity to be heard therein, either in person or by counsel."

In the case of Missouri-Kansas-Texas Railroad Co. v. Brotherhood of Railway & S.S.Cl., C.C.A. 7 (1951), 188 F.2d 302, the subject matter of the suit was a series of Awards which had been rendered by the Board pursuant to proceedings before it filed by the Clerks and the Telegraphers involving the same jobs. In all the proceedings before the Board the Carrier took the position that binding and conclusive awards could be rendered only after notice had been given to all whose rights might be affected. The Board ignored the carrier's position and gave notice only to the organization filing the claim and the carrier against whom it was filed. Thereafter the Board, with a referee sitting, found the Clerks' claims to be valid and ordered the positions in question assigned to the Clerks. Some time later the Board, with a different referee sitting, sustained the claims of the Telegraphers to the same jobs which were involved in the previous Clerks awards. Thereupon the carrier filed suit to enjoin the enforcement of the awards. The trial court concluded that it was the duty of the Board in the Clerks' dockets to give notice of all hearings to the Telegraphers and to all individual employes involved in the disputes and to hear their contentions as one dispute before making any awards or orders and similarly, in the matter of the Telegraphers' claims, it was the Board's duty to give notice to and hear the Clerks

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and all employes involved, and that the carriers were entitled, in each case, to have those duties performed by the Board and, in failing to perform such duties, the Board violated the Railway Labor Act, and denied the carriers due process of law. The Circuit Court of Appeals for this Circuit, in affirming the decision of the trial court, said (pp. 305-306):

> "The dilemma here posed results in large part from the refusal of the Board to bring both groups of claimants before it in one proceeding. Judging from a number of opinions accompanying awards and orders which were introduced as evidence in this cause, it appears to have been generally assumed that the Board has no authority under the Act to consider two agreements simultaneously, each in the light of the other. However, we are convinced from our examination of the Act that it does not require such construction. It has been stated that the rules of the Board which it is authorized to promulgate under Section 3, First (u) forbid such procedure. However, we have been cited to no such rule and doubt its existence in view of the fact that it appears that the Board itself has generally deadlocked on the question, with the carrier members consistently upholding the view that where a claim is filed against a carrier by a labor group contemplating the ousting of other employees in favor of the claimant, those other employees sought to be ousted have a vital interest in the proceeding and, under Section 3, First (j) of the Act, a right to notice and opportunity to participate in the hearing before the Board. The labor members have with equal consistency denied this contention. **We think logic and reason support the carrier's construction of Section 3, First (j) which provides that the Board shall give due notice of all hearings 'to the employee or employees and the carrier or carriers involved in any disputes submitted to them.' We can think of no employee having a more vital interest in a dispute than one whose job is sought by another employee or group of employees.**" (Emphasis supplied.)

The latest court case involving this problem is **Illinois Central Railroad Company vs. National Railroad Adjustment Board, Third Division et al** (U.S.D.C. Northern District of Illinois, Civil Action No. 53 C 1245, July 3, 1953.) The findings of fact, the conclusions of law and preliminary injunction entered in this case, which are not yet reported, are attached as Carrier's Exhibit F.

Attention is invited to paragraphs 4 to 9 inclusive of the conclusions of law and to the preliminary injunction, reading as follows:

> "4. The Third Division, National Railroad Adjustment Board, in failing to give due notice of any and all hearings or proceedings in said Docket TE-5722 has failed and neglected to accord the individual presently filling the position at Palestine, Illinois, which is in controversy in said Docket, and the organization representing the craft of which he is a member, due process of law in contravention of the Fifth Amendment to the Constitution of the United States.
>
> "5. The custom and practice of the National Railroad Adjustment Board, Third Division, of denying to individuals and organizations involved in disputes before the Board their statutory and constitutional rights to participate in the hearings before the Board if they have not been formally served with notice of the proceeding

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is a denial of due process of law in contravention of the Fifth Amendment.

"6. The failure of the Third Division, National Railroad Adjustment Board, to serve notice of the hearings or proceedings in Docket No. TE-5722 upon the individual presently filling the position in controversy and upon the organization representing the craft of which he is a member, is a dereliction of the duty imposed upon said Board by the mandatory requirements of Section 3 First (j) of the Railway Labor Act.

"7. The Railway Labor Act imposes upon the various Divisions of the National Railroad Adjustment Board the duty of serving notice of any proceeding before it upon all employees involved irrespective of whether such employees are members of the craft or class filing the claim with the Board.

"8. The notice required by Section 3 First (j) of the Railway Labor Act is jurisdictional and if the Board fails to comply with this Section of the statute it is acting without statutory authority. The National Railroad Adjustment Board may not assert its general power under the Railway Labor Act and at the same time disregard the essential conditions imposed upon it by Congress for the exercise of such power.

"9. Plaintiff has no adequate remedy at law and will suffer irreparable harm and injury unless defendants are required to comply with the provisions of the Railway Labor Act. The failure of the Board to serve the required notice will involve plaintiff in multifarious litigation. The equity powers of this Court are adequate to afford the relief herein sought by means of a mandatory injunction and should be exercised in the circumstances herein referred to.

* * * * *

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendants, NATIONAL RAILROAD ADJUSTMENT BOARD, THIRD DIVISION, and WILLIAM H. CASTLE, R. M. BUTLER, CLAUDE R. BARNES, C. P. DUGAN, J. W. WHITEHOUSE, E. T. HORSLEY, J. E. KEMP, G. ORNDORFF, R. SARCHETT and J. H. SYLVESTER, as members of and constituting the THIRD DIVISION of said BOARD, and DONALD F. McMAHON, acting as Referee and Member of said Board by direction of the National Mediation Board, are enjoined from proceeding in Docket No. TE-5722 unless and until they give formal notice to D. A. Shears, 708 North Howard Street, Robinson, Illinois, and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, 701 Brotherhood Building, Court and Vine Streets, Cincinnati, Ohio, and permit said persons to participate in the proceedings in said Docket No. TE-5722, * * *"

In this case, the United States Government moved to dismiss and stated in its Memorandum of Points and Authorities supporting such motion that:

"While the United States does not condone the failure to give notice to the individual employee now performing the dis-

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puted work, and believes any award in favor of the Telegraphers would be void in a proper suit concerning the award, it respectfully submits, for the foregoing reasons, that the complaint herein should abate and be dismissed for failure to state a cause of action."

Even without the requirements of Section 3 First (j) of the Railway Labor Act, the failure of this Board to serve notice of the proceedings before it on all of the employes affected or "involved" will constitute a denial of due process and violate the Fifth Amendment to the Constitution of the United States. The essential elements of "due process of law" are notice and opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case and a tribunal having jurisdiction of the cause. **12 American Jurisprudence, Section 573, page 267.** Notice is particularly required as essential to due process where the proceeding is of a judicial nature affecting the property rights of citizens and it cannot be denied but that the job rights and other rights incidental to employment are property rights.

The National Railroad Adjustment Board has also followed this sound principle. In Third Division Award 5432, Referee Jay S. Parker, after a careful review of all of the authorities, stated:

> "Therefore we bow to the inevitable and, notwithstanding what may be found to the contrary in any of our previous awards, hold that this case cannot now be heard on its merits because it appears from the records that the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, representing employes having rights that might be affected by our decision, were not served with notice of the filing of the claim and given an opportunity to be present and heard throughout all stages of the proceedings. In such a situation the proper procedure in our opinion is to dismiss the claim without prejudice, thereby affording the claimant an opportunity to take whatever action it may deem advisable in the future."

See also the following awards:

First Division	Second Division	Third Division	
14837	1523	5433	5781
14903	1524	5599	5785
	1525	5600	5790
	1526	5627	6051
	1527	5644	6052
	1640	5751	6072
		5959	

Third Division Awards 5432 and 5433, both decided by Referee Jay S. Parker, concerned themselves with substantially identical factual situations as are here involved. In each of those cases, as noted above, this Division dismissed the claim.

Third Division Award 6051 (Referee Thomas C. Begley) involved this same Telegraphers' Organization and this Carrier (South-Central District). Again the claim was dismissed.

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Of particular significance to this dispute is this Board's holding in **Award 5627** (Referee Hubert Wyckoff). In that award (Docket TE-5487), the Telegraphers' Organization and the New York, New Haven and Hartford Railroad were involved and identical contentions concerning the same work were there advanced by the Organization. The car record system on this Carrier employs the same devices and the same techniques as are found on the New Haven. The process on this Carrier, which is patterned after that on the New Haven, was placed into operation only after fairly extensive surveys of the system in operation on that railroad by this Carrier's representatives. The same principle there employed by this Board in dismissing this claim should be controlling here.

Without such notice, the Board is without authority to assume jurisdiction of and decide the issue, other than to deny it, since other interested parties, whose rights existing under other agreements would be seriously affected by a sustaining award will not have been given the notice as required by Section 3 (j) of the Railway Labor Act.

II. The Claims Presented in Paragraphs (a) and (b) Are Without Merit.

(1) The Dispute Referred to in Paragraph (a) of the Statement of Claim:

The subject matter of handling train orders is not a new one to this Division. Many awards have been rendered on the subject.

The train orders involved in this dispute are transmitted by the train dispatcher to a telegrapher located in the passenger station, who copies the train orders. The train orders for westbound trains are then placed in a small carrier, inserted in a pneumatic tube and are received at the West End Yard Office approximately one mile away, sometimes by the conductor, who removes the train orders from the carrier, and sometimes by a clerical employe, who removes the train orders from the carrier along with its other contents, placing the train orders for the conductor on the counter separating the yard office from the conductors' register room.

Telegraphers are not, nor have they ever been, employed in either the old or the West End Yard Office at Las Vegas.

Upon these facts as they are disclosed by the record and in the light of the Board's awards relating to the handling of train orders, the question raised by the Organization presents two aspects requiring the Board's study:

1. Is it a violation of the Telegraphers' Agreement for telegraphers to copy train orders, delivering them directly to the conductor by using a pneumatic tube?

2. To the extent that the function performed by the clerical employes at the West End Yard Office may be regarded as "handling train orders," does such handling violate the Telegraphers' Agreement when the handling does not occur at a telegraph or telephone office where an operator is employed?

Should question (2) be decided in the affirmative, a secondary question is raised concerning the penalty to be applied for such violations.

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The rights of telegraphic service employes to handle train orders are granted by Rule 62 of the Agreement between the Company and the Order of Railroad Telegraphers, effective January 1, 1952, reading as follows:

> "Rule 62. Train Orders. No employe other than covered by this schedule and train dispatchers will be permitted to handle train orders at telegraph or telephone offices where an operator is employed, and is available or can be promptly located, except in an emergency, in which case the telegrapher will be paid for the call."

The term "handle" as it is used in Rule 62 and other rules of similar construction has been interpreted to mean the copying of the train orders and the delivery of the orders to the conductor. This concept of the rule is derived from the language which the rule employs, and which provides:

> "No employe other than covered by this schedule and train dispatchers will be permitted to handle train orders * * *"

The application generally accepted is that **no other employe** may be used; hence, the limitations imposed by this portion of the rule pertain to **persons** and not to **devices.**

There is no rule in the controlling Collective Bargaining Agreement, nor has there been a ruling handed down by this Division, which holds that train orders must be passed by hand from the telegraph operator to the employes who are to execute them. Rather, the rule has been construed as preventing another **person** not covered by the agreement (the rule also permits handling by train dispatchers) to receive the orders from the telegraphers at an office where telegraphers are employed, and to then carry them to some other point **where telegraphers are employed** for delivery.

This Division, although moving within the somewhat restrictive boundaries of the rule, in deciding questions regarding the handling of train orders have steadfastly given consideration to the practical needs of railroad operation. It is clear that it was never intended to eliminate the use of such a device as is used here to effectuate the delivery of train orders. To do so would require the immediate discard of a device used for delivering train orders, as old as the train order method of operation itself: the train order hoop.*

On some carriers, another common device is used for the delivery of train orders. This medium consists of a platform constructed near the track at the point of delivery, with two horizontal arms, between which the train order can be suspended on a string. The train order copied by the telegrapher for delivery to a passing train is then tied to a string and suspended on the stationary platform to be picked up by the engineer and conductor of the train to which the order is addressed.

The use of such devices to assist telegraphers in delivering train orders to employes to whom they are addressed has long been recognized as proper under the agreement and since the purpose accomplished by the pneumatic

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*To anyone familiar with railroad operation, the use of the train order hoop need not be explained. Its purpose is to permit a telegrapher to deliver a train order to a passing train without stopping the train to permit hand to hand delivery.

[fol. 42]

tube is precisely the same, it cannot be said that its use is in violation of the telegraphers' right to handle train orders.

An extreme but nevertheless convincing analogy between the accepted method of delivering train orders by using the train order hoop, when the operator places the train orders in a clip on the banboo hoop,* holding it by the handle for delivery to the engineer or conductor, who removes the orders from the hoop, and the use of the pneumatic tube, where the telegrapher copies the train order and places it in a carrier to be received directly by the conductor.

Both devices accomplish the same purpose. For example, the same end would be achieved if the handle of the train order hoop was long enough to span the distance covered by the pneumatic tube. The method of "handling" the train order would be the same.

The installation and use of the pneumatic tube does not supplant any of the work performed by the telegraphers at Las Vegas incident to the handling of train orders, customarily regarded as work reserved to that craft by their agreement. Telegraphers still copy and deliver the train orders at Las Vegas, as formerly.

The first aspect of the question raised by the Organization concerning train orders may be disposed of by analyzing the method used in making the delivery in the light of the term "handle" as it appears in Rule 62 and as it has many times been interpreted by this Division.

The rule as interpreted does not prohibit the use by telegraphers of train order hoops, train order forks, stationary train order delivery platforms, pneumatic tubes or other devices to effect delivery of train orders. The rule, in reserving the work, refers not to devices but only to —

"No employe other than * * *"

Since the use of the pneumatic tube takes no work away from the telegraphers' craft, no more so than any of the other devices commonly used for the same purpose, and in the absence of any regulation prohibiting its use, it clearly follows that in the circumstances where the train order is copied by the telegrapher, placed in the tube and received directly by the conductor at the West End Yard Office, no violation of the Agreement occurs because the train order has at no time in the operation been handled by employes other than those covered by the Telegraphers' Agreement and the train dispatcher.

The second aspect of the question requires further study.

The contention here is that the use of a clerical employe at the West End Yard Office to remove the orders and place them on the counter to be picked up by the conductor violates the rights granted to employes of the telegraphers' craft to handle train orders.

It should, perhaps, at this point be made clear that the performance of this extremely minor function is purely one of convenience and practical

*Some carriers now use the high speed delivery fork, where the train order is suspended on a string between "V" shaped sticks attached to a handle held by the telegrapher.

[fol. 43]

operation. Quite frequently, when trains require train orders, they are sent to the point of delivery prior to the time the conductor reports for duty. Where the train orders are received along with other items for use by the yard office clerical forces, the train orders are removed by the clerk, along with the other contents. Rather than replacing the train orders in the receptacle in which they are received, for subsequent removal by the conductors, it has been customary, as a convenience, to place them on the counter for the conductor, thus saving the conductor the need for taking them out of the receptacle a second time, himself.

Even so, such handling does not violate the Telegraphers' Agreement as it has been interpreted and applied by the parties and as it has been interpreted by this Division.

In dealing with the claims' other aspect, we studied the first part of Rule 62, which limits the handling of train orders to certain individuals.

The Organization has sought unsuccessfully to have the rule construed in such a manner as to limit the handling of train orders to telegraphers and train dispatchers in all instances. The rule, however, is not so restrictive.

Rule 62 of the controlling agreement provides that —

> "No employe other than covered by this schedule and train dispatchers will be permitted to handle train orders * * *"

The rights conferred by the rule, however, are by the same rule confined to —

> "* * * telegraph or telephone offices where an operator is employed and is available or can be promptly located * * *."

The latter stipulation is clearly an exception within the rule in that it does not grant an exclusive right to handle train orders at all points. The rule authorizes the handling of train orders by persons other than those named in the rule at points other than —

> "* * * at telegraph or telephone offices where an operator is employed and is available or can be promptly located * * *."

Under the rule established and steadfastly adhered to by this Division, we must treat as reserved to the Carrier all rights which are not granted to the employes, by the Agreement: **Awards 2132** (Referee Thaxter), **2491** (Referee Carter), **2622** (Referee Parker), **4304** (Referee El Kouri), **4322** (Referee El Kouri), **5331** (Referee Robertson), **5897** (Referee Dougherty).

The controlling agreement contains a specific rule covering "Train Orders." In it the Carrier did bargain away to a limited extent some of its inherent rights to have train orders handled by any employe in any manner. It was, however, only in the specific and limited manner set forth in the train order rule.

The Carrier agreed that train orders would be handled by telegraphers only —

> "* * * at telegraph or telephone offices where an operator is employed and is available or can be promptly located * * *."

[fol. 44]

Since the Carrier did not at the same time bargain away its right to have train orders handled by other employes **at points where operators are not employed**, that right must be treated as reserved to the Carrier.

The parties have mutually so construed the rule in applying it on this property. On October 23, 1944, the Employes' General Chairman wrote the Carrier's General Manager as follows concerning the intent of the train order rule:

> "We take the position that the schedule is violated when other than the operator is permitted to handle train orders **where an operator is employed**, and for that reason we consider the claim is ligitimate under the provisions of Rule 68 and should be allowed."

The case under discussion at that time concerned the handling of a train order by an employe other than a telegrapher or train dispatcher at a phone booth where an **operator was not employed**, about a mile and one-half from the telegraph office.

A conference was ultimately held to discuss the claim, at which time it was agreed that the handling occurred at a point where **a telegrapher was not employed**. The General Manager pointed out concerning the conference:

> "Our discussion in this case went more to the question of the proper application of Rule 68 of the schedule, and particularly the language,
>
> > 'No employee other than covered by this schedule and the train dispatchers will be permitted to handle train orders at telegraph or telephone offices where an operator is employed.'
>
> "It is particularly significant that the rule uses the language, 'at telegraph or telephone offices.' The intention appears clear as a prohibition against clerks, trainmen or others handling train orders in the office where an employe coming under the schedule is employed.
>
> "The circumstances forming basis of the claim of Telegrapher Robinson do not fit into that picture. Conductor McKay copied Order No. 175 for his train at the telephone booth located about a mile and a half from the telegraph office. As I advised you, I do not consider Operator Robinson has any proper claim in this case."

The claim was withdrawn and closed.

In the handling of subsequent questions involving the rule, the Organization agreed that Rule 62 was not violated where conductors handled train orders at points where operators were not employed because as the Employes' General Chairman stated in his letter of October 6, 1944 —

> **"Rule 68* would not cover for the reason an operator is not employed at telephone booths between open telegraph offices."**

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*Rule 68 of the agreement then in effect was the same as present Rule 62.

[fol. 45]

In a recent case submitted to this Division by this same Petitioner, Docket No. TE 5854, Award No. 6071, the Organization sought to have this long-standing interpretation of the train order rule and the customs and practices thereunder set aside, and to have the rule apply in such a manner as to grant telegraphers the right to handle train orders at all points, even at points where operators are not employed, notwithstanding the express language of the rule providing otherwise.

The claim in Docket No. TE 5854, which involved the handling of a train order at Boise Junction, a point where an operator is not employed, by an employe other than a telegrapher, was denied. This Division, in its Award No. 6071, rejected the proposition of the Organization and upheld the Carrier's right under the rule to have train orders handled by employes other than telegraphers and train dispatchers at offices where telegraphers are not employed.

The Carrier is aware of and has reviewed the awards of this Division rendered on the subject of handling train orders, viz. 86, 709, 1096, 1167, 1168, 1304, 1456, 1489, 1713, 1719, 5013, 5087, 5122 and 5872.

Some of these awards are based on the Telegraphers' Scope Rule; some on train order rules similar to Rule 62 of the controlling agreement. All support the right of telegraphers to "handle" train orders, although almost without exception, dissents to the Division's findings have been filed. In each case, however, the award was based upon a factual situation where the telegrapher copied a train order which was then delivered by another employe not covered by the agreement to the conductor addressed at another point where there was an operator employed.

As such, these awards are clearly distinguishable from facts and circumstances here involved where the so-called handling occurred at a point where there are no operators employed. The claim here is based on Rule 62. This Division in its Award No. 6071 involving the same parties, and which is controlling, held that the rule was not violated where employes other than telegraphers handle train orders at points where telegraphers are not employed.

The second aspect of the question raised by the Organization with respect to train orders is therefore equally as unmeritorious as the first. Here it is contended that the use of an employe other than a telegrapher to handle train orders at the West End Yard Office violates Rule 62 of the Telegraphers' Agreement.

Telegraphers are not employed at the West End Yard Office. It follows that a violation of the Agreement could not, therefore, occur at the point, since Rule 62 permits the use of employes other than telegraphers to handle train orders at points where telegraphers are not employed.

In the analysis of Rule 62, there remains only the question of penalty for the violation of its provisions.

In submitting its claim to the Carrier, the Organization presented it in the usual manner, i.e., eight hours' pay for an unnamed idle employe.

The Carrier has repeatedly called the attention of this Committee to its obligation under the Railway Labor Act to submit claims which name the claimant, setting forth the facts upon which his alleged loss is based.

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This Division has repeatedly dismissed claims which by their vague and indefinite nature preclude an accurate determination of merit.

Aside from this, there is absolutely no basis for a claim for eight hours' pay. Such a penalty could be awarded only if the agreement expressly provided for such a penalty. Here the agreement does not so provide.

The Organization's claim in paragraph (a) is based on an alleged violation of Rule 62 of the agreement. That rule stipulates that where its provisions are violated —

> "* * * the telegrapher will be paid for a call."

The Carrier submits that Rule 62 was not violated. Even if this were so, there is no proper basis for the payment of a penalty of eight hours. The maximum penalty which could in any event be asserted or awarded would be a call. That is the penalty provided by the rule itself. A greater penalty could not be awarded without rewriting the rule, and the Board has many times held that such a function is not within its jurisdiction.

The complete inconsistency of the Organization's claim is demonstrated in paragraph (c). The claim made there for "the equivalent of a day's pay for each eight hour shift" is based upon alleged violations of the agreement, said by the Organization to have occurred out of the circumstances set forth in paragraphs (a) and (b).

The claim for compensation is made —

> "* * * since August 25, 1952, the date of which the new yard was placed in service * * *"

although the use of IBM machines in the West End Yard Office at Las Vegas, the condition upon which the Organization's Claim (b) is based, did not begin until October 28, 1952, over two months after the date of the Organization's claim. Even the date of October 5, 1952, used by the Organization in submitting the claim on the property pre-dated by 23 days the actual existence of the events upon which they were based.

The Carrier submits that its method of handling train orders at Las Vegas does not violate Rule 62 of the Telegraphers' Agreement and that Claim (a) of the Organization should be denied.

(2) The Dispute Referred to in Paragraph (b) of the Statement of Claim:*

This part of the Organization's claim involves the Organization's attempt to have this Board direct the Carrier to replace, with telegraph employes, the clerical employes now engaged in the handling of car records and other yard office clerical functions in the Las Vegas West End Yard Office by use of mechanical devices known as IBM machines.

This part of the Organization's claim is identical to the dispute presented to the Board involving the North Yard office at Salt Lake City, Utah, and

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*The Carrier's discussion of the merits of Paragraph (b) of the Organization's Statement of Claim is not in any sense a waiver of the Carrier's jurisdictional objection set forth in Part I of the Carrier's Position herein.

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the Carrier's position on the merits set forth in its Response to Notice of Ex Parte Submission in that docket is equally applicable to Paragraph (b) of the Organization's claim in this docket. The Carrier's position in the Salt Lake City case is incorporated herein by reference and is made a part of this submission.

It has been demonstrated in this submission that —

(1) The dispute covered in Paragraph (b) of the Organization's claim should be dismissed; and

(2) In any event, there is no merit to either of the Organization's Claims (a) and (b).

For the reasons set forth herein, the Carrier submits that the Organization's claims in this docket should be denied.

All information and data contained in this Response to Notice of Ex Parte Submission is a matter of record or is known by the Organization.

OPINION OF BOARD: The procedural question of giving a third party notice has been fully disposed of. Therefore, these claims will be considered on their merits.

The employes states that prior to August 25, 1952, the Carrier's freight and communication activities were located in and near the passenger station at Las Vegas. A telegraph office was located in the passenger station building. Telegraphers employed in that office handled all train orders, delivering them directly to the crews of all trains in both directions. The telegraphers also performed all the communication work normally associated with the operation of such a terminal. Exchange of the messages, consists, and other items involved in the communication work, between the telegraph office and the yard office was accomplished by means of a pneumatic tube. On August 25, 1952, the Carrier extended its freight facilities about a mile west of the passenger station. A new yard office was built at the west-end of the new yard and was open for business on August 25, 1952. This office is known as the West-End Yard Office. The necessary clerical force was moved from the old yard office near the passenger station. Instead of providing for telegraphers at the new yard office, a new pneumatic tube was installed to connect the existing telegraph office with the new yard office. This device apparently was used for the same purpose as the one it replaced. But in addition, it was also used to effect delivery of train orders to the crews of those trains which departed from the new West-End Yard Office. The grievants object to the use of the tube, contending that their right to deliver train orders to the crews addressed is thereby violated. The telegraphers perform the usual work involved in the handling of train orders, that is, they copy them in manifold, repeat to the dispatcher to check for mistakes, accept responsibility for their proper delivery to the crews addressed, and prepare the copies for delivery. However, instead of actually delivering the orders to the crews in the usual manner, and as required by the Carrier's operating rules, the telegraphers are obliged to place the orders, along with other material, in the pneumatic tube carrier. This pneumatic tube carrier substitutes for human messenger. It carries the papers to the West-End Yard Office where they are received by a clerk. The orders are then delivered to the crews by the yard clerk, who takes them out of the pneumatic tube.

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The issue presented in Claim (a) by the employes is simply whether employes outside of the scope of the Telegraphers' Agreement may properly be required to deliver train orders.

As we stated in Award No. 6071, this is not a new issue and while the awards are conflicting, there is unanimity upon the proposition that where, as here, the Scope Rule lists positions instead of delineating work, it is necessary to look to practice and custom to determine the work which is exclusively reserved by the Scope Rule to persons covered by the Agreement.

Rule 62 reads as follows:

> "Train Orders. No employe other than covered by this schedule and train dispatchers will be permitted to handle train orders at telegraph or telephone offices where an operator is employed, and is available or can be promptly located, except in an emergency, in which case the telegrapher will be paid for the call."

From a careful reading of the record before us, we find that no telegrapher is employed at the West-End Yard Office. Therefore, the Carrier has not violated Rule 62 of the effective Agreement. The record also shows that the telegrapher performs every duty that he has performed in the past, with the exception of personally handing to the crews of those trains which depart from the new West-End Yard Office the train order. The Scope Rule of the Telegraphers' Agreement does not give to them this work of personally handing to the crew these train orders. Rule 62 states that they have the exclusive right, except in emergency, of the handling of the train orders at stations where telegraphers are employed. Custom and practice show that employes other than telegraphers have handled train orders at offices where the telegraphers are not employed, and as they are not employed at the West-End Yard Office the Carrier did not violate the Agreement.

The employes state that sometime after August 25, 1952, the Carrier placed in service at the West-End Yard Office a number of electro-mechanical devices, the purpose of which is to compile records which are necessary to the operation of the Carrier's freight trains, and to communicate those records to other offices, some of which are located many hundreds of miles from Las Vegas. Before the change was made, the purely clerical work, that is, the compiling, typing, writing, of the required records and reports was performed by clerks; and the communication work, that is, the transmission by telegraph, teletype, telephone was performed by telegraphers. The new machines are semi-automatic, requiring a human operator to set the machines in motion and to feed them the material which results in communication of intelligence between distant points. The employes object to this use of clerical employes, who are not subject to the Telegraphers' Agreement, to perform the work required to make these machines function as communication devices and thus divert work from the telegraphers.

The Carrier states that it installed certain IBM machines at its West-End Yard Office to handle the preparation of wheel reports, consists, manifest and manifest passing reports, and other clerical statements and records at Las Vegas which were formerly prepared and handled manually by clerical employes at the yard office. The Card Record Bureau at Las Vegas, located in the West-End Yard Office, employs the following machines:

(1) One IBM Alphabetical Key Punch Machine
(2) Two IBM Tape Controlled Card Punch Machines

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(3) Two IBM Card Controlled Tape Machines
(4) One IBM Sorter Machine
(5) One Alphabetical Accounting Machine
(6) One IBM Alphabetical Interpreter
(7) Two Teletype Receiving Printers and
One Teletype Transmitter

The machines involved in the Card Record process at Las Vegas, the work functions performed by the employes at Las Vegas in connection with the machines and the results achieved are identical in every detail to the machines used, work functions performed and results achieved in the same operations at the Carrier's North Yard Office in Salt Lake City. The question of the use of these machines at the Carrier's North Yard Office at Salt Lake City was decided in Award 8656 on January 12, 1959 and that Award denied the claim made by the employes. The key to the entire IBM system is the punch card in which holes are punched either manually or automatically from a punched tape to correspond with certain information which the associated equipment uses in the compilation and reproduction of various reports and records. The new system was put into effect by the Carrier on October 28, 1952. No part of the process as it pertains to the receipt and transmission of information on the teletype printer machines occurs as a result of activation of any device by the employes of the IBM Card Record Bureau — the process is entirely automatic.

The Board finds that Award No. 8656 stated:

> "A careful review of the record does not support petitioners' claim that other employees of the Carrier are performing work belonging exclusively under the Telegraphers Agreement. Rather such work as telegraphers might otherwise perform or might have rights to under the Agreement is now performed not by other employees but by the automatic operation of the machines in question.
>
> "The Division has not supporter the proposition that when an automatic machine is installed to perform a certain function, the employee who previously performed that function is entitled to remain simply to watch the automatic machine operate. * * *"

We are in accord with what was said in Award No. 8656 in that the Division has not supported the proposition that when an automatic machine is installed to perform a certain function, the employe who previously performed the function is entitled to remain idly by and watch the automatic machine operate. However, from the evidence produced at the hearing in this docket, we find that these machines are not automatically operated. To the contrary, we find that the clerks who are now operating these machines must place these perforated cards in the machine, then push a button and then the machine operates.

The record shows that under the Telegraphers' Agreement the Scope Rule states that the agreement will govern the wages and working conditions of teletype operators and printer operators. The record also shows that even though the Scope Rule does not give to the telegraphers the exclusive right to perform this work, they have exclusively performed the work, in the past, of teletype operators and printer operators.

The Carrier states in this submission when it refers to the number of machines that it has installed at the West-End Yard Office at Las Vegas,

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that it has installed teletype machines and its gives in detail the work performed by these teletype machines. The Carrier states that the teletype machines function as follows:

> "This auxiliary equipment functions completely automatically in conjunction with the car handling system. For the receipt and distribution of information used in the car record processes, two teletype receiving printers and one teletype transmitter have been installed adjacent to the Car Record Bureau. Attached to the receiving printers are two teletype reperforators.
>
> "The teletype receiving printer is activated by electrical impulse imposed automatically at some distant point. At the receiving point it produces information on a printed page. Using the same impulses, and simultaneously to the printing of the information on paper, the reperforator punches a tape on which information corresponding to that shown on the printed page is reproduced.
>
> "The tape produced by the reperforator is then used to produce punched cards by the process desribed in Item (2) above.
>
> "The teletype transmitters operate in the same manner: The tape produced electrically from cards by the process described in Item (3) is inserted in the teletype transmitter. Electrical impulses imposed by the code on the tape activate the teletype transmitter. The machine produces a printed copy of the information contained on the tape and at the same time reproduces the same information on a receiver at some distant point.
>
> "A reperforator at the distant point of reception duplicates the information on a tape and the entire procedure is repeated."

The Carrier, by its own admission, states that the tape produced electrically from cars by the process described in Item 3 is inserted in the teletype transmitter. This tape is inserted by a clerk and it is work which comes under the Telegraphers' Agreement. The teletype receiving printer is also work that comes under the Telegraphers' Agreement and has been performed in the past by telegraphers and not by clerks. The tape at a distant point that is transmitted to the teletype receiving printer must be inserted by someone to activate that machine.

In Award No. 8656, the Board found that the work was not performed by other employes, but by the automatic operation of the machines in question. We find that the work performed on the two teletype receiving printers and the one teletype transmitter at the West-End Yard Office is performed by an automatic operation of the machines in question, but is activated by a clerical employe. Tape-producing machines activate by clerks may not be used to reperforate tape or be connected to through circuits. Tape produced by a clerk must be fed into a transmitting machine for communication between on line offices by a telegrapher.

The Board finds that the Carrier has violated the Telegraphers' Agreement when it permitted its clerical force to operate the two teletype receiving printers and the one teletype transmitter at its West-End Yard Office.

The Carrier shall compensate the senior idle employe covered by the Telegraphers' Agreement for the equivalent of a day's pay for each eight-

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hour shift since October 5, 1952 at the Telegraphers' applicable rate to that particular location for each day or shift that the two teletype receiving printers and the one teletype transmitter was used at that location.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violate as stated in the Opinion.

AWARD

Claim (a) denied.

Claims (b) and (c) sustained in accordance with Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 14th day of July, 1961.

DISSENT TO AWARD NUMBER 9988, DOCKET NUMBER TE-6800

This docket involves two separate claims based on different alleged Agreement violations. Part (a) involves a claim arising out of the handling of train orders by other than telegraph employes, and Part (b) involved the Carrier's utilization of automatic IBM machines in its mechanized car record procedures.

In this **Award 9988**, which was adopted by a majority composed of the Referee and the five Labor Members, the Board correctly finds that Part (a) of the claim should be denied, that the manner in which train orders were handled at Las Vegas was not in violation of the Telegraphers' Agreement. The Board correctly holds that the ultimate personal delivery by clerical employes of train orders to the train crew members does not violate the so-called Train Order Rule, and, further, that "the Scope Rule of the Telegraphers' Agreement does not give to them [telegraphers] this work of personally handing to the crew these train orders." This holding represents a correct reading of the applicable Agreement provisions and a proper adherence to this Board's prior decision in **Award 6071** (Referee Begley) involving the same Agreement provisions, the same Carrier and the same problem.

This dissent is not directed to the Board's action as to Part (a) of the claim. We do dissent, however, to the Board's erroneous action in sustaining Parts (b) and (c).

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The dispute presented in Part (b) of the claim involved the Carrier's use of the IBM machines and is the same, identical dispute which was presented to and denied by this Division in a companion docket, TE-6799, resulting in denial **Award 8656** (Referee Guthrie).* The parties in the two dockets are the same, the same Agreement is involved, and, save for the fact that here the dispute arose at Las Vegas, Nevada, instead of Salt Lake City, Utah, the facts of the two disputes are identical in every respect. The results achieved by the IBM machines here and those in **Award 8656** are the same in every detail. None of this is open to question because the record in the two dockets is the same, identical record, both the Carrier and the Telegraphers' Organization having incorporated in this docket the factual statements, arguments and contentions set forth in their respective submissions in Docket TE-6799 (**Award 8656**). In sum, the dispute here and in **Award 8656** are one and the same dispute.

The Board has recognized the identity of the dispute in the two dockets. In fact, we find the Board reciting from and concurring with the very statements in **Award 8656** which formed the basis for the Board's denial of the Telegraphers' claim that its Agreement had been violated in the utilization of automatic IBM machines. Thus, while approving **Award 8656**, the Board comes to a conclusion directly opposite to that reached in **Award 8656** and finds that the Carrier's action in the same, identical circumstances was a violation of the Telegrapher's Agreement! One may well ask: "How can this be?". Unfortunately, the answer to this question cannot be found in the Board's Opinion in **Award 9988** nor in any logical or reasonable appraisal of the record in this case. The instant decision is simply not explicable on the basis of the record before the Board. The explanation, if any, must be found elsewhere.

It will be our purpose in this dissent to point out the serious errors in the instant award. At the outset we point out that, apart from any consideration of the merits of this automation aspect of the dispute, the Board's inconsistent action in denying the claimed violation in **Award 8656** and sustaining the claimed violation in Part (b) here, strikes at and challenges the very basis of the Board's position in railroad labor relations as intended under the Railway Labor Act.

The Board's action here leaves the Carrier and, for that matter, the employes, in an unworkable situation. In **Award 8656** this Board, in a decision from which there was no dissent, found that the Carrier's manner of operation in its mechanized car record procedures did not violate the Telegraphers' Agreement. This Board stated:

> "A careful review of the record does not support petitioner's claim that other employees of the Carrier are performing work belonging exclusively under the Telegraphers Agreement. Rather such work as telegraphers might otherwise perform or might have rights to under the Agreement is now performed not by other employees but by the automatic operation of the machines in question."

That was on January 25, 1959. For nearly three years both the Carrier and the Organization have operated under such award. Almost three years later,

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*Both Docket TE-6799 (**Award 8656**) and Docket TE-6800 (**Award 9988**) were companion cases and were originally handled together with Judge Robert G. Simmons in April 1954 on the Third Party Notice issue. They were not disposed of at that time, and the dockets later became separated.

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this Board reverses itself, and this same Carrier and its employes are now told in **Award 9988** that clerical employes are performing work belonging to telegraph employes in violation of the Telegraphers' Agreement. Such a situation is intolerable and makes for an instability flatly contrary to the clear intent of the Railway Labor Act. Further, all carriers are charged by Congress in the Interstate Commerce Act with the duty to conduct their operations in an efficient manner. The Board's action makes such objective impossible.

It has long been axiomatic with the National Railroad Adjustment Board that to fulfill its function of dispute settlement a uniformity of interpretation of labor agreements is essential. To interpret the same contract one way in one award and then in the exactly opposite way in another only serves to create further disputes involving the identical issue.* The Board has recognized this sound principle and held that unless an award is "palpably wrong" there is never any warrant in overruling, in a subsequent dispute between the same parties, a previous award construing the same provisions of their Agreement. See **Award 8104** (Referee Guthrie) and **7968** (Referee Elkouri) as representative on this question.

Moreover, this Division in **Award 9435** (Referee Begley) held:

> "This Referee is in accord with the thinking of the Referee who sat with the Third Division in rendering Awards 9254 and 9255, wherein he states that he 'considers the use of the words "without prejudice" unfortunate if they were intended to convey the meaning urged by the Carrier'. However, **this Referee is also inclined to follow precedent on the point of issue, particularly in view of the Railway Labor Acts' requirement that where no money award is concerned, as in the present case, the Board's Awards shall be final and binding upon both parties to the dispute."****

In an article which appeared in the July 1959 **Railroad Telegrapher**, Mr. J. M. Willemin, attorney for the Telegraphers' Organization, stated:

> "When a collective agreement rule has been construed, the interpretation of that particular rule becomes, so to speak, a part of the agreement as though it had been written into the agreement in the first place. **The interpretation thus becomes a vested right, and should not, except for very clear, positive, and cogent reasons, be subsequently changed.** The parties to any agreement have the right to change the same at any time, in conformity with the provisions of the Railway Labor Act."

This observation finds sound roots in the Railway Labor Act, itself, which provides at Section 3, First (m) that awards of this Board of the type of **Award 8656** are "final and binding" upon the parties.

One would have thought, then, that in view of **Award 8656** there would have been no question as to the disposition to be made in the identical dispute

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*In **Award 8656** the Board found that the use of the transmitting teletype machines at Salt Lake City was not in violation of the Telegraphers' Agreement. The Board now says that it is a violation to automatically receive a communication at Las Vegas from Salt Lake City, although it has held that there was no violation in its transmission from Salt Lake City!

**All emphasis is supplied unless otherwise indicated.

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in Part (b), that the Board would recognize it should be denied. Such action would have been in accord with what the Telegraphers' Organization, itself, has said. The interpretation of the Telegraphers' Agreement which was made in **Award 8656** became "so to speak, a part of the agreement * * * a vested right". The Board recognized and followed this principle in denying the claim put in Part (a), and its failure to do so as to Part (b) goes a long way down the road in destroying confidence in the **ad hoc** adjudicatory processes envisaged by the Railway Labor Act. This is especially true where no attempt was made to show that **Award 8656** was "palpably wrong" and the Board in its Opinion here does not even attempt to advance any reasons, let alone "clear, positive and cogent" reasons for not following the previous interpretation.

And it must be remembered, the situation here was unique — this was not simply a case of the Board following sound precedent — here we had the **identical** dispute presented on the same record.

The foregoing discussion is made without regard to the merits of this dispute to which we now turn.

(1) Even a casual reading of the Board's Opinion discloses such inconsistent and inaccurate statements as to demonstrate a lack of understanding of the issues tendered in this dispute.

In **Award 8656** this Board, upon the identical record, found and held that clerical employes were **not** performing work which belonged exclusively to Telegrapher employes. This Board found that "such work as telegrahers might otherwise perform or might have rights to under the Agreement is now performed not by other employes but by the **automatic operation** of the machines in question."

In the instant **Award 9988**, this Board (page 4) recognizes, as, of course, it must, that —

> "The machines involved in the Card Record process at Las Vegas, the work functions performed by the employees at Las Vegas in connection with the machines and the results achieved are identical in every detail to the machines used, work functions performed and results achieved in the same operations at the Carrier's North Yard Office in Salt Lake City.",

and on the same page, this Board also finds —

> "No part of the process as it pertains to the receipt and transmission of information on the teletype printer machines occurs as a result of activation of any device by the employees of the IBM Card Record Bureau — **the process is entirely automatic.**"

The Board then states

> "**We are in accord with what was said in Award No. 8656** in that the Division has not supported the proposition that when an automatic machine is installed to perform a certain function, the employee who previously performed the function is entitled to remain idly by and watch the automatic machine operate." **(Last paragraph, page 4, Award 9988)**

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Then follows the almost unbelievable and wholly inconsistent statement —

> "* * * we find that these machines are not automatically operated."

This is not all. Subsequently, on page 6, the Board says:

> "We find that the work performed on the two teletype receiving printers and the one teletype transmitter at the West-End Yard Office **is performed by an automatic operation** of the machines in question, but is activated by a clerical employee."

The Board also stated:

> "The new machines are **semi-automatic**, requiring a human operator to set the machines in motion and to feed them the material * * *." **(Award 9988, page 3, second paragraph)**

The Board thus demonstrates its inconsistency on a point which is crucial to its ultimate determination. At one place it says the machines are automatic and concurs with prior **Award 8656** to that effect, and then in the next breath proceeds to say they are not "automatic" but are "semi-automatic" because someone has to start the machines. Then, in further confusion, it concedes that the machines "automatically operate." It is regrettable to find inconsistency as between some of the awards of this Division. To find inconsistency within the same award is indefensible.

Further misunderstanding is also shown at the bottom of page 4, where the Board, in purporting to distinguish this case from **Award 8656**, said —

> "To the contrary, we find that the clerks who are now operating these machines must **place these perforated cards in the machine**, then push a button and then the machine operates."

Then on page 6, first paragraph, reference is made to the fact that the machine-produced tape is inserted in the teletype transmitter and —

> "This tape is inserted by a clerk and it is work which comes under the Telegraphers' Agreement. The teletype receiving printer is also work that comes under the Telegraphers' Agreement and has been performed in the past by telegraphers and not by clerks. The tape at a distant point that is transmitted to the teletype receiving printer must be inserted by someone to activate that machine."

It is thus impossible to determine whether it is the insertion of the cards or the tape or both which the Board is considering. The Carrier is thus left in a real quandary. Further, the Board's concern over what is done at the "distant point" (see last sentence of above quotation) when this dispute concerned only the machines at Las Vegas indicates a serious lack of understanding as to what was involved here.

The Board's inconsistent and erroneous statements in its Opinion in **Award 9988** show it to be "palpably wrong," valueless as precedent and, in addition, of doubtful legal validity.

(2) We will subsequently discuss the Board's confusion as to the term "automatic." We discuss at this point the purported basis for its

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erroneous statement that these machines are "not automatically operated", but that they are "semi-automatic." In the last paragraph on page 4, after indicating that it was "in accord" with Award 8656, the Board stated:

> "However, from the evidence produced at the hearing in this docket, we find that these machines are not automatically operated. To the contrary, we find that the clerks who are not operating these machines must place these perforated cards in the machine, then push a button and then the machine operates."

Thus, the Board admits that this "evidence" furnished the basis for its purported distinguishing of this case from that involved in Award 8656, a task which was surely necessary to the sustaining of Part (b) of the claim in this docket.

The "hearing" referred to in the Opinion was the hearing which was held before the Third Division with the Referee sitting with the Division as a member thereof. As everyone knows, such a hearing, with the Referee present, is not a hearing in the usually accepted sense of that word. It is supposed to be an oral argument to the Board on the record in the dispute before it. For the Board to have accepted, considered and relied upon any "evidence" at the referee hearing which did not appear in the written record was flatly contrary to this Division's rules and regulations, and we submit such action by the Board has destroyed the Award's validity.

In the letter which this Board sent the parties advising of the hearing before the Board with Referee Begley, it was stated:

> "The hearing is for the purpose of orally reviewing and arguing the evidence already presented. The Third Division is not disposed to accept evidence not heretofore presented." (Letter dated March 1, 1961)

Moreover, even with the initial hearing before the Third Division, the Division's Executive Secretary in his notice of hearing advised the parties:

> "In consideration therewith you are hereby advised that the Third Division is not disposed to admit known evidence at an oral hearing which has not theretofore been presented for consideration by the interested parties during negotiations between them in their undertaking to adjust the dispute without petition to the Adjustment Board." (Letter dated April 9, 1956)

Such instructions are, of course, premised on the Board's original regulations issued as Circular No. 1, October 10, 1934:

> "Hearings. — Oral hearings will be granted if requested by the parties or either of them and due notice will be given the parties of the time and date of the hearing.
>
> "The parties are, however, charged with the duty and responsibility of including in their original written submission all known relevant, argumentative facts and documentary evidence."

(These regulations are codified in the Code of Federal Regulations, Title 29, Chapter III, Part 301.)

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The record in this docket upon which **Award 9988** was rendered, was by the parties' own stipulation, the identical record before the Board in Docket TE-6799, **Award 8656**. For the Board to consider anything not contained therein was a flagrant violation of its own rules.

All familiar with the Board's procedure are aware of the Board's rule. Indeed, at the start of the hearing which was held in this docket with the Referee present, the Chairman of the Division admonished both parties of the Board's rule in this regard. This was reiterated during the hearing.

The Board, having provided that no evidence will be presented or considered at hearings, must adhere to its own rules. While this situation is not commonplace, an Agency violating its own rules has been considered and condemned by the Courts. In **Sangamon Valley Television Corp. v. United States** (1959), USCA-DC, 269 F.2d 221, the Court of Appeals held —

> "Agency action that substantially and prejudicially violates the agency's rules cannot stand."

This case involved an application for a television license. The Federal Communications Commission had set a time limit on the filing of written statements favoring or opposing the application and provided that no additional statements would be accepted thereafter. Contrary to such rule, the applicant for the television channel filed ex parte statements and discussed the application with the Commissioners individually after the time the Agency had set for the filing of written statements had passed. In that case, unlike the situation here, there was no showing that these statements furnished the basis for the Commissioners' decision. See also, **Service v. Dulles** (1957), 354 U.S. 363, 388, where the Court said:

> "While it is of course true that under the McCarran Rider the Secretary was not obligated to impose upon himself these more rigorous substantive and procedural standards, neither was he prohibited from doing so, as we have already held, and having done so he could not, so long as the Regulations remained unchanged, proceed without regard to them."

(3) The Board, in its erroneous attempt to distinguish this case, infers that the Referee in prior **Award 8656** did not understand the meaning of the word "automatic". Because the machines must be activated, we are told that they are not "automatic" but instead are "semi-automatic". The Board's distinction is without merit, whatever "evidence" is considered.

The word "automatic" has historically been subjected to various changes in meaning, but within recent generations has acquired stable senses. It is correctly applied to the automatic machines under consideration here, which are so constructed that when certain conditions have been fulfilled, i.e., place plugs in proper jacks, punched cards and perforated tape in the desired position, and push the button which turns on the power, they operate indefinitely without supervision until the conditions have materially changed. The conditions have materially changed, of course, when one operation for which the machine were set is completed and another set-up is made. Thus, under the stable sense of the word as defined in Webster's Dictionary of

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Synonyms (1951)* these machines are in fact entirely "automatic", and not merely semi-automatic. See **Awards 4063** (Referee Carter), **6416** (Referee McMahon) **8656** (Referee Guthrie), **9313** (Referee Howard A. Johnson), **9333** (Referee Weston), **9611** (Referee Rose).

According to **Award 9988**, there can be no automatic machines except perhaps a perpetual motion machine, and even that must at least once be activated. As far as we know, all automatic machines require some outside action to start them or commence their operation. But **Award 9988** says that any machine which needs starting by an outside source is only "semi-automatic". It is on the basis of this mistaken and long since rejected view of automation that the Board proceeded to make **Award 9988** flatly contrary to **Award 8656**.

The argument that an automatic machine is not automatic when it requires human action to start its automatic action has been recognized as specious a number of times. In **Award 1008** (Referee Mills), this Board said that —

> "Every automatic operation requires human thought and action to release it."

More recently, in **Award 6416** (Referee McMahon), the Board rejected the argument that an automatic elevator was not automatic because it was still necessary to push a button to activate the elevator.

This dispute cannot be disposed of on the basis of labels. Even though these machines be mistakenly labeled as "semi-automatic", there is still no basis to conclude that the Telegraphers' Agreement was violated. The mere insertion of a tape or activation of an automatic teletype machine is not in this situation work which comes under the Telegraphers' Agreement. The violation here charged was premised on allowing clerks to "operate printing and/or mechanical telegraph machines." Merely to start a machine is not to "operate" it. Rather, to "operate" a machine is to perform work on it, and here the Board recognized that the "work performed" on the two teletype receiving printers and the one transmitter is "performed by an automatic operation of the machines in question." (Page 6, second paragraph)

This dispute was not concerned with the activation of an automatic machine. Not once in the handling of this matter before the Board did the Organization premise its claim on any alleged right to merely activate the

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*"Automatic has historically been subjected to various changes in meaning and has only within recent generations acquired stable senses. Originally, it was used to describe a thing that was self-acting or self-activated because it contained the principle of motion within itself. 'In the universe, nothing can be said to be automatic' (Sir H. Davy). Now in the sense here considered, it is applied to machines and mechanical contrivances which, after certain conditions have been fulfilled, continue to operate indefinitely without human supervision or until the conditions have materially changed; thus, an automatic firearm is so constructed that after the first round is exploded the force of the recoil or gas pressure loads and fires round after round until the ammunition is exhausted or the trigger is released; a thermostat is an automatic device which maintains the temperature of artificially heated rooms by operating the appropriate parts of a furnace when the temperature exceeds or falls below the point at which it is set."

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machines, and the mere act of inserting the IBM perforated tape into the automatic teletype machines was never discussed in the record. The Board in this dispute has erroneously equated "operation" with "activation".

The dissenting Labor Member's distinction in **Award 9913** between operating a machine and the mere act of turning it on and off points up the error in the statement in **Award 9988** that:

> "The Board finds that the Carrier has violated the Telegraphers' Agreement when it permitted its clerical force to operate the two teletype receiving printers and the one teletype transmitter at its West-End Yard Office." (Page 6, next to last paragraph)

The error in the Board's conclusion is further compounded because of its failure to distinguish between the transmitting and receiving machines. The record here is barren of even an attempted showing that clerks at Las Vegas have any duties whatsoever in activating the receiving teletype machines at that point. **Award 9988** now says that it is a violation of the Agreement to automatically receive the tape at the West End Yard Office where no clerical employe participates in the activation of the receiving machines*, yet it was perfectly proper and not in violation of the Agreement to utilize the transmitter machine at Salt Lake City which, in fact, automatically activates the receiving machines at the West End Yard Office at Las Vegas in addition to other places. The Board in its **Award 8656** is telling the Carrier it is not a violation of the Agreement for clerical employes to activate the transmitter machine and then "operate" it at Salt Lake City but in **Award 9988** it decides that it is a violation of the Agreement at the West End Yard Office at Las Vegas for the Carrier to utilize the automatic receiving machines where no employe has anything whatsoever to do with their operation.

The mere act of inserting the IBM perforated tape is not and does not have essentially a communication purpose. The record here shows, without denial by the Organization, that the primary purpose of the machine arrangement was the performance of what is undisputedly a clerical function, i.e., the creation of a compiled typewritten list of matters which are both to be retained as records at the Las Vegas office, as well as being transmitted to other distant points. As pointed out by the Carrier and quoted by the Board at page 5, the teletype "produces a printed copy of the information contained on the tape and at the same time reproduces the same information on a receiver at some distant point." Thus, with the accomplishment of the clerical function, the incidental communication function was automatically performed without any infringement whatsoever of any Telegrapher's rights. This was also the case in **Award 9913** (Referee Begley). It was, in fact, recognized in **Award 9913** that where an alleged communication function is automatically performed as a simultaneous concommitant of the performance of a recognized clerical function, telegraphers' rights are not thereby impaired or violated, and that there is no requirement that such automatic functions should be removed from the machines. While in that case the Board was referring to the production of perforated tape as an automatic result of the physical act of typing reports by clerks on manual teletype machines, the same principle is even more applicable where the automatic

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*See first sentence of second quoted paragraph at Page 5 of the Board's Opinion — "The teletype receiving printer is activated by electrical impulse imposed automatically at some distant point." No one at Las Vegas even turns these machines on.

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preparation and compilation of clerical reports simultaneously results in the automatic transmission thereof. (Even if the act of inserting the tape and activating the teletype could be said to be merely a semi-automatic act, it was nevertheless for the purpose of completing a recognized clerical function, and the simultaneous transmission and communication results were still themselves a mere automatic incident of that clerical function.) All of this was recognized by President G. E. Leighty in his discussion of these automatic machines in his report to the "Thirty-fifth Regular and Second Quadrennial Session of the Grand Division of The Order of Railroad Telegraphers" which was held in Chicago, Illinois, in June 1960. In discussing these machines, Mr. Leighty stated at page 192 —

> "As inevitably occurs in the case of an invention, it is greatly improved upon as time passes and that has been very true of the mechanical telegraph machine. The International Business Machine Company brought to the railroad industry the IBM machine in the last few years, which can combine the work of the clerical employe, for example, who before prepared the communication and gave it to the telegrapher to transmit, and the work of the telegrapher, because it actually transmits the communication which formerly was transmitted by the telegrapher. Thus, as the clerk does the work on the IBM which he formerly did on the typewriter, preparing a communication for transmission, this machine at the same time cuts the tape the simpler machine (the teletype) used to cut in the telegraph office, and with the assistance of reperforators or a wire chief in combining circuits, this clerk can also in most cases from his clerical station do the actual transmitting in one operation."

We have seen that although the Board said that the machines are "not automatic" it recognized (page 6, second paragraph) that the actual communication work was performed by the automatic operation of the machines:

> "* * * the work performed on the two teletype receiving printers and the one teletype transmitter at the West-End Yard Office is performed by an automatic operation of the machines in question * * *."

We submit that if the "work performed" is "performed by automatic operation of the machines" there can be no performance of such work by clerical employes so as to violate Telegraphers' rights. This inescapable conclusion cannot be avoided by saying that the machines are "activated by a clerical employe" and thus the Telegraphers' Agreement was violated.

(4) We now turn to the Board's very serious and presumptious error in Award 9988 in directing the Carrier as to how it shall conduct its operations and to rewrite the Telegraphers' Agreement accordingly — all in accordance with its own ideas of what should be done but without any lawful basis whatsoever.

The authority of the Board is limited by law to interpreting the Agreement between the parties. The Board is without authority to attempt to direct the operation of the Carrier in any manner. As was stated in Award 6967 (Referee Carter) —

> "It is the prerogative of Management to detemine the manner in which the work shall be performed * * *. It may use any

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method it sees fit to correct violations without any restraining directives by this Board."

When the Board here says that —

> "Tape-producing machines activated by clerks may not be used to reperforate tape or be connected to through circuits. Tape produced by a clerk must be fed into a transmitting machine for communication between on line offices by a telegrapher." (Award 9988, page 6, second paragraph),

it goes far beyond its statutory authority and is contrary to fundamental principle. Apart from rules governing its procedures, this Board does not possess any rule-making power.

Furthermore, the dictum that "Tape-producing machines activated by clerks may not be used to reperforate tape" is not only contrary to Award 8656 covering the identical dispute, but is contrary to the previous awards of this Division involving teletype and similar machines on other carriers, the most recent award being Award 9913 (Referee Begley) rendered by the Board constituted as here, as well as Awards 9005, 9006 (Referee Daugherty), 9454 (Referee Grady), and 8538 (Referee Coburn).

Moreover, the Board's "directive" as to the manner in which IBM produced tape is to be used by this Carrier erroneously infers that the IBM machine produced tape was produced by a clerk. This is completely at odds with the facts and the record. The tape was produced by the automatic IBM machines, howsoever activated, and was not produced in any sense of the word by a clerk. This Board knows better. In Award 9913 (Referee Begley) where the teletype was actually physically operated by a clerk it was still recognized that the tape was "automatically made when the consists, messages, reports, etc., are typed out by the clerks [on teletype machines]."

This Board may erroneously determine to sustain this claim; it cannot, however, determine that a tape producing machine may not be used to reperforate tape* or be connected to through circuits, or that such tape cannot be inserted in a transmitter by other than a Telegrapher. The Board's statement is all the more serious upon the realization that in the entire handling of this matter the Telegraphers' Organization never even indicated that the Carrier was limited in its use of the tape producing machines or the tape produced thereby.

(5) The Board's Opinion as to Part (b) also shows a refusal to correctly read and comprehend the plain language of the Scope Rule of the Telegraphers' Agreement. The Opinion states:

> "The record shows that under the Telegraphers' Agreement the Scope Rules states that the agreement will govern the wages and working conditions of teletype operators and printer operators. The record also shows that even though the Scope Rule does not give to the telegraphers the exclusive right to perform this work, they have exclusively performed the work, in the past, of teletype operators and printer operators." (Page 5)

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*This was precisely involved in denial Award 9913.

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The Scope Rule includes teletype operators and printer operators, but its coverage is clearly limited to such positions as are "herein listed." Then, under "Rule 5, General Telegraph Offices," the Agreement lists "4 Las Vegas 'VG'" followed by the positions and rates. The "West-End Yard office" is not listed. Compare the Opinion in **Award 8538** (Referee Coburn):

> "Does the currently effective Agreement provide that the work involved here [i.e., operation of teletype machines] is exclusively telegraphers? The Scope Rule includes certain designated positions 'and such other positions as may be shown in the appended wage scale or which may hereafter be added thereto.'
>
> * * * * *
>
> "Petitioner's position is untenable for several reasons. First, there is no evidence in this record that printer clerks were performing such 'identical work.' Manifestly this would have been impossible because no teletype machines were in use in these locations prior to September 1, 1953. **Second, while the wage scale appended to the agreement does list printer clerks and other positions in various telegraph offices on this property, the coverage of the Agreement is limited to the specific positions set out in the wage scale appendix.** There is no reference to or listing of the position of printer-clerk at either the Richmond or Los Angeles offices or in other offices of this Carrier where clerical employes operate teletype machines. * * *"

Just as in **Award 8538**, the Agreement provisions pertinent here limit the application of the Scope Rule to Telegraphers in the listed Telegraph Offices, and there is no reference to or listing of the position of teletype or printer operator or any other telegrapher position at the West-End Yard Office at Las Vegas.

The Board in denying Part (a) of this claim had no difficulty in correctly reading the Train Order Rule which limited the exclusive grant of rights to "telegraph or telephone offices where an operator is employed." The Board pointed out, at page 3, that "we find no telegrapher employed at the West-End Yard Office," and held that since Telegraphers "are not employed at the West-End Yard Office the Carrier did not violate the Agreement." The same common-sense reading of the Scope Rule required a denial of the claim in Part (b).

(6) The Board has also failed to recognize this dispute in Part (b) as essentially nothing more than a protest against the installation of labor-saving machines — automation. Carrier correctly argued in this docket that such protests were not proper subjects of the adjudicatory system under the Railway Labor Act and that the Board was without jurisdiction thereover. It was pointed out that the remedies, if any, for the economic problems posed by situations where automatic machines, howsoever activated, tend to reduce employment must be found in the field of negotiations.

Railroad labor organizations, themselves, have recognized that the proper forum to consider and deal with the impact of automation is in the field of negotiation. See, in this connection, interview with Grand President Harrison of the Brotherhood of Railway Clerks, **Railway Age**, July 29, 1957. More-

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over, the Organization in this docket never disputed, in fact, never discussed, the Carrier's position that this was a matter for negotiation and not adjudication. This was for good reason because it has also recognized the validity of the Carrier's argument, that the dispute here is one for negotiation. President Leighty, in his Report to the 1960 Telegraphers' Convention, reviewed this entire problem. He said:

> "The most prevalent type of mechanical telegraph machine used in the beginning was the teletype and while we quite generally were given jurisdiction over such machines that were used in telegraph offices, they were frequently installed in traffic and 'off-line' offices and given to other employes than telegraphers to operate and very frequently this was permitted to occur without any protest being lodged from our people because we were not manning the machines. Thus it gradually came to pass that employes in at least one other craft than ourselves were operating some of these machines. This even led at times to negotiated agreements by the railroads with the other organizations than ours which at least gave other employes some rights to the operation of this type of machine. The result was that almost universally when the National Railroad Adjustment Board was created in 1934, and we resorted to it for support of our claim to exclusive jurisdiction, we failed to receive it from that body.
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> * * * * *
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> "These improvements have in this way created a situation where a composite operation on the IBM machine takes place, consisting partly of work formerly performed by the clerical employe and part that the telegrapher previously performed but now no longer performs. **As arbiters such as the NRAB were almost universally holding that neither craft had exclusive jurisdiction over these new and improved machines, it seemed useless to continue our claim that exclusiveness was ours,** while at the time the machines were being placed by most carriers in the offices of clerical employes to operate, leaving us with nothing but a claim.
>
> "Accordingly **I revised our policy and began to claim instead that we have an equity in what in fact is a composite operation where these IBM and teletype machines are used.** So far as railroad managements were concerned, I have found they have quite generally been willing to entertain this new type of claim and to make agreements with us that give us a share in this work. The amount of work performed on these machines is quite often greatly expanded over what was handled where messages were moved by Morse or even by teletype only and the result is that on several roads where we were making no progress in securing exclusive jurisdiction, **we are now by agreement being integrated into the composite work of both teletype and IBM machines** without material loss of positions which otherwise would have resulted from the introduction of this type of communication device.
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> * * * * *
>
> "* * * This improved type of rapid transmission and reception is being adopted on many railroads of the country and it was im-

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perative that we get in on the ground floor of each new installation and have the management understand our policy in which we are claiming only an equity in the work in question. * * *" (Page 191, Report of President G. E. Leighty to the "Thirty-fifth Regular and Second Quadrennial Session of the Grand Division of The Order of Railroad Telegraphers", Chicago, Illinois, June 1960)

The Organization in effect recognizes, as it must, that what we have in this dispute is a jurisdictional dispute over a new "composite operation" resulting from the utilization of the new automatic machines. As such, the dispute should have been denied or, in any event, dismissed as being jurisdictional in nature and not properly susceptible of disposition by Board award. This type of situation was discussed and remanded in **Award 4768** (Referee Stone):

> "* * * Patently, the marvel of CTC types of centralized control and electrical operation was not contemplated in assigning the traditional duties to the two crafts. (Telegraphers and Dispatchers) The new task of operating a control board in part unites and in greater part supplants the duties and positions formerly assigned to each. Therefore, the matter of its proper assignment constitutes a jurisdictional dispute * * *."

See also **Awards 4452** (Referee Carter), **4769** (Referee Stone), **6205** (Referee Shake), **6224** (Referee McMahon), **7299** (Referee Carter), and **8143** (Referee Elkouri).

The Board's sustaining of Part (b) of the claim awards the Telegraphers' Organization more than a mere "equity in what in fact is a composite operation" and which the Organization, itself, recognizes is properly sought at the bargaining table.

(7) The Organization in Part (c) of the claim sought, for the alleged violations, the payment of one day's pay for each 8-hour shift, day and night, since August 25, 1952. Such payments were to be made to the "senior idle employe or employes covered by the Telegraphers' Agreement." The award sustained the claim, changing the date to October 5, 1952 and adding the further limitation that payment is to be made for each shift "that the two teletype receiving printers and the one teletype transmitter was used at that location."

The claim as submitted and as sustained by the Board is vague and indefinite and for that reason alone should have been rejected by the Board. As representative on this question, see **Awards 8674** (Referee Vokoun), **8500** (Referee Daugherty), **8330** (Referee Wolff), **8124, 6937** (Referee Coffey), **6885, 6760** (Referee Parker), **6529, 6528, 6486** (Referee Rader), and **6348** (Referee L. Smith), The Carrier cannot be required to search its records to determine both the dates of violation and the persons to whom such allowances are to be paid. As representative on this question, see **Awards 8855** (Referee Bakke) and **9343** (Referee Begley). Moreover, it is probable that many of the Carrier's records necessary to such a determination are no longer available.

Not only is the phrase "senior idle employee covered by the Telegraphers' Agreement" so vague and indefinite as to be incapable of ascertainment, it also erroneously purports to reward many persons who were not in any way

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even affected by the alleged violations.* There is no sanction for such action either in the Railway Labor Act or in the Agreement.

It is clear that the Board's order here cannot satisfy the requirements of the Railway Labor Act. In this connection see **System Federation No. 59 vs. La. & Ark. Ry. Co.**, 119 F.2d 509, where the Court of Appeals stated:

> "Further finding that it was unable to determine who upon the list submitted, was entitled to relief, it yet found generally that many of the employees had been furloughed and not reemployed in violation of the rules and were therefore entitled to relief. Its findings of fact therefore, and its award, instead of being and containing the definite determinations of fact, as to the persons entitled to relief, and the relief to which they are entitled, contemplated and required by the act, consisted of merely general statements, that some of the employees were entitled to some relief, and that those so entitled should be awarded such relief as they were entitled to. The Act contemplates not merely general conclusions, but precise and definite findings of fact and final and definite awards, capable of enforcement, not vague general outlines which must be filled in by the courts."

For all of the foregoing reasons we dissent.

/s/ J. F. Mullen

/s/ P. C. Carter

/s/ R. A. Carroll

/s/ W. H. Castle

/s/ D. S. Dugan

ANSWER TO DISSENT, AWARD 9988, DOCKET TE-6800

The Carrier Members' dissent is one of the most amazing documents ever to have been conceived by those masters of sophistry. Its greatest value is to document for all time the inconsistency of its authors.

First of all, they improperly describe the dispute. There was a single claim, in favor of one employe for each shift, based on an allegation that the manner in which the Carrier was effecting delivery of train orders and handling communication work at a new yard office in Las Vegas violated various provisions of the Telegraphers' Agreement.

However, it makes no material difference whether we consider the dispute as consisting of one or two claims. Many disputes involve more than one aspect and require consideration of more than a single issue.

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*The Agreement here covers two districts, South Central and Northwestern, and extends from Los Angeles to Salt Lake City, thence up to Portland, Oregon. Any employe in that territory would be an employe "covered by the Telegraphers' Agreement." Thus, an employe at Portland, Oregon, many miles from Las Vegas, Nevada, if he be the senior idle employe on any of the three shifts on any day since October 5, 1952 is given a gift of a day's pay!

[fol. 66]

That portion of the dispute in which the Employes contended that Rule 62 was violated by the manner in which delivery of train orders was effected raised two questions: (1) Does the "handling" of train orders — which, with one exception, is restricted by the rule to telegraphers — include their physical delivery to the train crews addressed; and (2) is the new yard office at Las Vegas a place subject to the rule.

Both of these questions were improperly answered. With respect to the first question Rule 62, and the practically unbroken line of precedent awards on the point involved were completely ignored, the award merely stating — without citation of authority — that the scope rule does not give telegraphers the work of personally handing train orders to the crews. This in the face of numerous awards to the contrary which were cited to the Referee. I will take the time to note two of these:

Award 5871 (Referee Yeager):

> "In all of these awards claims were sustained for acts of the carrier similar to the one complained of in this docket. It is true that in most, if not all of them, the charge was a violation of a specific prohibitory provision of the particular Agreement, as in Award 1096. **In the opinions where the matter was exhaustively considered, however, the true basis of the awards was the removal of work from the Scope of the Agreements and causing it to be performed by those not covered,** and not the fact that in the instances there was a prohibitory provision." (Emphasis added).

Award 5122 (Referee Carter):

> "The Carrier urges that the rule is different where a telegrapher is not maintained at the point where the train order is to be delivered to the crew that is to execute it. It further urges that the method employed has been used for many years and is a practice which has been generally followed. Assuming that it did become a general method of handling under situations such as we have here, it is not controlling for the reason that the work of sending, receiving, copying and **delivering** train orders is reserved to telegraphers by their agreement. **The delivery of train orders to a train crew by one outside the Telegraphers' Agreement, is a violation of the Telegraphers' Agreement.**" (Emphasis added).

These awards deal, respectively, with cases where train orders were delivered by employes other than telegraphers at a place where a telegrapher was employed but not on duty, and at a place where a telegrapher was not employed. Both of them cite numerous awards reaching similar conclusions.

The Referee, however, based his opinion on a single prior award, 6071, which he wrote himself, which did not involve a similar issue, and which has been declared erroneous by a subsequent award involving the same basic issue, the same parties and the same agreement: Award 8867.

The second question was primarily one of fact. The record shows that the parties were in agreement that the new yard office is located within the confines of Las Vegas, the Carrier twice stating that the new yard office was "within the terminal" along with the telegraph and other offices. This fact alone divested the case of any similarity to Award 6071. This fact

[fol. 67]

placed the disputed issue on all fours with Part 1 of the claim in Award 5122, even to the distance of about a mile from the telegraph office in each case.

This agreement upon the facts and applicability of Award 5122 were brought to the attention of the Referee in a special supplemental memorandum by this writer at the time of panel argument.

Both the facts and the prior awards having a proper bearing on the issue were ignored. The Carrier Members characteristically express their satisfaction with the result, which proves once again that they are not interested in establishing and maintaining a line of sound precedent awards — unless they are favorable to the carriers.

Disposition of the issue relating to the delivery of train orders by Award 9988 is erroneous. I so stated at the time the award was adopted, and reserved the right to append to the award my reasons for so holding. These comments will serve that purpose.

The balance of the Carrier Members' dissent is a rambling, repetitious attack on that portion of the award which sustains the right of telegraphers to perform communication work. Its author apparently made no effort to systematize his remarks, thus making it somewhat difficult to organize a coherent reply. Perhaps that was the reason.

One main theme of the dissent is an alleged concern over the value of precedent. They say:

> "It has long been axiomatic with the National Railroad Adjustment Board that to fulfill its function of dispute settlement a uniformity of interpretation of labor agreements is essential. . . ."

They cite numerous awards and an article from the official organ of the Employes in support of their statements.

Much more authority could have been cited. Indeed, the Supreme Court of the United States has held that such uniformity is desirable. **Slocum v. The Delaware, Lackawanna and Western Railroad Company, (339 U.S., 239).**

If the Carrier Members were sincere in these contentions I would be most happy to agree with them. But they are not sincere. Precedent, to them, is sacred only when the result is favorable to them. On the same day that they issued their dissent to Award 9988 they issued a dissent, signed by the same members, to Award 9998, q.v., in which they referred to the following of precedent as "pernicious error." The precedent there was in favor of the employes.

Such inconsistency surely should make suspect anything its authors utter.

The dissenters' displeasure with Award 9988 on this point arises from their comparison of this case with the dispute disposed of in Award 8656. In that case Referee Guthrie ruled in favor of the Carrier on a finding that the machines at Salt Lake City operated automatically and thus eliminated all work belonging to telegraphers. In that respect Award 8656 was "palpably wrong", and Referee Begley properly noted the difference between his finding and that of Referee Guthrie.

[fol. 68]

The Carrier Members, in their championing of precedent, forgot to mention the fact that our "axiomatic" thinking includes an exception when the "precedent" is "palpably wrong". Award 8656 is one of those cases envisaged by Referee Garrison when he wrote Point 3 of his famous memorandum to Award 1680, and thus should have been overruled.

The record here clearly shows that the machines do not operate automatically. The Carrier itself describes the operation in detail, noting — among other things — that the teletype machines require attention from someone to make them operate as communication devices. The Referee correctly found that employes not subject to the telegraphers' agreement were thus performing the work of a "teletype operator", one of the classifications enumerated in the scope rule of the telegraphers' agreement.

The effect of such enumeration in a scope rule is so well known and so compatible with the Referee's finding here that no comment is necessary.

Now let us go back to "precedent". In at least a dozen instances during the past nine years, to my personal knowledge, the Carrier Members have argued that the right of telegraphers to perform communication work is not breached as long as they are not entirely eliminated from the operation. In other words, if a telegrapher is permitted to insert a coded tape in a teletype transmitter, even though the work of coding the tape was performed by others, he has no valid complaint.

I have resisted that contention with all the energy I possess. It ignores the fact that preparation of the tape, used in most instances solely for transmission of the information involved, represents the major portion of the communication work. But the Carrier Members have prevailed in most cases.

The latest such case was Award 9913. That award was adopted over my protest by a majority consisting of the same Carrier Members who signed the present dissent and the same Referee with whom they now find fault for reaching the same conclusion in Award 9988 that he reached in Award 9913.

In other words, the Carrier Members were happy to join the Referee in denying a claim where telegraphers were permitted to insert the tape in a transmitter, but they disagree with him when he applies the same reasoning to sustain a claim where the telegraphers were not even permitted to perform that minimal amount of work.

As I have noted previously, such inconsistency is characteristic of the dissenters, and makes their dissents of little value.

Not only are the dissenters inconsistent; they also have little regard for the true facts. For example, they say in a footnote, with respect to operation of the receiving teletypes at the location in question "No one at Las Vegas even turns these machines on." No such statement appears in the record. Furthermore anyone who has even the slightest acquaintance with operation of such machines knows that they must be "turned on", that the received material must be torn off, that various other actions by human attendants are essential, and that all of these functions are included in the classification "teletype operator", an employe covered by the scope of the Telegraphers' Agreement on this property.

[fol. 69]

Another example is their quotation, out of context, of a small portion of the Report of the President of the Telegraphers' Organization to the last convention. No such references were made in the record where the Employes could have made suitable reply. The subject of the President's remarks was not stated. That subject did not include disputes such as we were here considering. If the dissenters wish to challenge this statement let them publish the full text of the President's report. But they should pay for its publication themselves just as the Organization paid for it originally.

In some respects the dissent is correct, or nearly so. The dissenters recognize the absurdity and futility of "hearings" before the referee. But let us not forget it was the Carrier who requested this "hearing", so if it served to clarify anything that was in the record to its detriment, it has no one to blame but itself. Here, we must think of the Carrier and the dissenters as little boys who initiate a game of marbles but refuse to play unless they always win.

As a matter of fact, and regardless of what the Referee's words are taken to mean, the Board did not accept or act upon any "evidence" that was not in the written record. The Carrier there stated that "The tape produced electrically from cards by the process described in Item (3) **is inserted in the teletype transmitter.**" (Emphasis added). Also, the Carrier stated that ". . . two teletype receiving printers and one teletype transmitter have been installed . . .". See Carrier's "Statement of Facts" in its Ex Parte Submission. These statement were made about the location involved, where no telegraphers were employed. It stands to reason that employes other than telegraphers were the ones by whom the tape ". . . is insrted in the teletype transmitter." This was the "evidence" referred to, and it is in the written record. It follows that the dissenters' conclusion in the following statement is wrong, although their premise is correct:

> "For the Board to have accepted, considered and relied upon any 'evidence' at the referee hearing which did not appear in the written record was flatly contrary to this Division's rules and regulations, and we submit such action by the Board has destroyed the Award's validity."

The two remaining points I wish to discuss further prove the inconsistency of the dissenters.

First, the Carrier did not make the argument that:

> "The Scope Rule includes teletype operators and printer operators, but its coverage is clearly limited to such positions as are 'herein listed' . . .".

The Carrier Members made it, contrary to the Boards rules and their own understanding of them. The Referee correctly ignored such extraneous 'evidence' and argument.

Second, the argument raised by the dissenters in point (7) of their dissent was not advanced in the record, and thus has no proper relevance to any phase of the case. It is obviously an afterthought, designed to aid the Carrier in any effort it may choose to make to avoid full compliance with the award.

[fol. 70]

We take note of the fact that claim (c) in Award 9753, a case involving these same parties, was similar in all essential respects to claim (c) in Award 9988. The dissenters found no fault with its form there. Furthermore, the parties had no particular difficulty in reaching agreement on the payments to be made in that case. Clearly, they should have no difficulty in reaching agreement here.

I sincerely hope that neither the Carrier nor anyone else will be so misled by the dissenters' drivel that they make the mistake of taking it seriously.

J. W. WHITEHOUSE
Labor Member

[fol. 71]

NATIONAL RAILROAD ADJUSTMENT BOARD THIRD DIVISION
ORDER—July 14, 1961

To accompany Award Number 9988
Docket Number TE-6800

To Union Pacific Railroad Company, Mr. A. D. Hanson, Assistant to Executive Vice President-Personnel, Omaha 2, Nebraska.

The Union Pacific Railroad Company is hereby ordered to make effective Award No. 9988 made by the Third Divi-
[fol. 72] sion of the National Railroad Adjustment Board (copy of which is attached and made part hereof), as therein set forth; and if the Award includes a requirement for the payment of money, to pay to the employe (or employes) *the sum to which he is (or they are)* entitled under the Award on or before January 1, 1962.

National Railroad Adjustment Board, By Order of Third Division.

Chicago, Illinois.

I do hereby certify that the above is a true and correct copy of the order accompanying Award No. 9988 in Docket No. TE-6800.

S. H. Schulty, Executive Secretary.

June 25, 1963

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

MOTION TO DISMISS—Filed September 13, 1963

(Oral Hearing Requested)

The defendant Union Pacific Railroad Company moves the Court as follows:

1. To dismiss the action because the Complaint fails to state a claim upon which relief can be granted because plaintiff is not a proper party to bring this action under Section 3, First, (p) of the Railway Labor Act.

2. To dismiss that portion of the action seeking an accounting because the Complaint fails to state a claim upon which such relief can be granted.

3. To dismiss the action because it appears from the face of the complaint that certain clerical employes of defendant at Las Vegas, Nevada, and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, AFL-CIO, their collective bargaining agent under the provisions of the Railway Labor Act, are parties indispensably necessary to a full and final adjudication of this action and none of them has been made a party hereto.

Knowles and Knowles, By E. G. Knowles, H. Lustgarten, Jr., James A. Wilcox, Attorneys for Defendant.

[fol. 73]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

REQUEST FOR ADMISSIONS—Filed November 12, 1963

To: The Order Of Railroad Telegraphers, Plaintiff:

Please take notice that the defendant hereby requests the plaintiff, pursuant to Rule 36 of the Federal Rules of Civil Procedure, to admit or deny within ten (10) days after service of this request, for the purposes of the above-entitled action only:

Requested Admission No. 1.

That each of the following documents, copies of which are attached hereto, are true copies of the original documents;

(a) Copy of letter dated November 10, 1960, written on the letterhead of the National Railroad Adjustment Board, Third Division, 220 South State Street, Chicago, Illinois, signed by Mr. S. H. Schulty, Executive Secretary, and addressed jointly to Mr. Geo. M. Harrison, Grand President, Brotherhood of Railway & Steamship Clerks, B. of R. C. Building, Cincinnati, Ohio, and Mr. Stanley B. Eoff, General Chairman, 529 Governor Building, Portland, Oregon, with copies to Messrs. G. E. Leighty, A. S. Herrara and A. D. Hanson.

(b) Copy of letter dated November 16, 1960, written on the letterhead of the Grand Lodge, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, Brotherhood of Railway Clerks Building, Cincinnati, Ohio, signed by Mr. Geo. M. Harrison, Grand President, and addressed to Mr. S. H. Schulty, Executive Secretary, Third Division, N.R.A.B., 220 South State Street, Chicago, Illinois, with copies to Mr. G. E. Leighty, President, The Order of Railroad Telegraphers, 3860 Lin-

dell Boulevard, St. Louis, Missouri, and Mr. Stanley B. Eoff, General Chairman, 529 Governor Building, Portland, Oregon.

Requested Admission No. 2.

That the letter described in Requested Admission No. 1(b) above is the "specific disclaimer" which is referred to at page 9 of Plaintiff's Memorandum In Opposition to the Motion to Dismiss filed in the above matter on or about October 18, 1963.

Requested Admission No. 3.

That the letter described in Requested Admission No. 1(b) above is the basis by which the Clerks' Brotherhood is [fol. 74] stated to have "specifically disclaimed any interest in the dispute between plaintiff and defendant" and which is referred to at page 7 of Plaintiff's Memorandum In Opposition to the Motion to Dismiss filed in the above matter on or about October 18, 1963.

Respectfully submitted,

Knowles and Knowles, E. G. Knowles, Clayton D. Knowles, James F. Culver, By E. G. Knowles, H. Lustgarten, Jr., James A. Wilcox, Attorneys for Defendant.

ATTACHMENT TO REQUEST FOR ADMISSIONS

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Chicago 4, Illinois, November 10, 1960

Certified Mail—Return Receipt Requested

Mr. Geo. M. Harrison, Grand President, Brotherhood of Railway & Steamship Clerks, B. of R. C. Building, Cincinnati 2, Ohio.

Mr. Stanley B. Eoff, General Chairman, 529 Governor Building, Portland 4, Oregon.

Gentlemen: This is notice of the pendency of a dispute before the Third Division, National Railroad Adjustment Board, identified as Docket No. TE-6800, on the petition of the Order of Railroad Telegraphers, against the Union Pacific Railroad Company, which dispute is described in the attached.

Hearing of this docket is scheduled for 10:00 AM., C.S.T., Tuesday, December 6, 1960, at Room 1830—220 South State Street, Chicago, Illinois.

Copies of the ex parte submissions are attached.

[fol. 75] You will have the right to appear and file papers and any documents you desire in answer thereto, furnishing eighteen copies thereof to the Division.

Kindly acknowledge receipt.

Yours very truly,

S. H. Schulty, Executive Secretary.

cc: Mr. G. E. Leighty
Mr. A. S. Herrera
Mr. A. D. Hanson

Grand Lodge
Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, Brotherhood of Railway Clerks Building, Cincinnati 2, Ohio, Geo. M. Harrison, Grand President.

File 281-19-10, Docket TE-6800, Subject—Miscellaneous Grievances—Union Pacific (W), November 16, 1960.

Mr. S. H. Schulty, Executive Secretary, Third Division, N.R.A.B., 220 South State Street, Chicago 4, Illinois.

Dear Sir: Receipt is acknowledged of your letter of November 10, 1960, giving notice of the pendency of dispute before the Third Division, National Railroad Adjustment Board, between the Union Pacific Railroad Company and The Order of Railroad Telegraphers. You advise that said dispute bearing Docket No. TE-6800 will be considered by the Third Division at 10:00 A.M., C.S.T., Tuesday, December 6, 1960, at Room 1830—220 South State Street, Chicago, Illinois.

From the description set forth in your letter and the material attached thereto, it would appear that this is a dispute between the Union Pacific Railroad Company on one hand and The Order of Railroad Telegraphers on the other hand involving the interpretation or application of the agreement between them covering the rates of pay, rules and working conditions of employes represented by The Order of Railroad Telegraphers. If this understanding is not correct, I would appreciate being further advised. [fol. 76] If my understanding of the nature of this dispute, as set forth in the preceding paragraph, is correct, please be advised that neither the Brotherhood of Railway Clerks nor the employes it represents are involved in such dispute between a carrier and the representative of another craft concerning the interpretation of its agreements between the carrier and the representative of such other craft. The rights of employes represented by the Brotherhood of

Railway Clerks are predicated upon agreements between the carriers and our organization. If, at any time, and for any reason, a carrier party to an agreement with our organization should undertake to assign work covered by such agreement to employes not covered thereby, we shall, of course, take appropriate steps pursuant to the provisions of the Railway Labor Act to correct any such violation of our agreement and to protect the employes we represent against any loss resulting from any such violation.

Very truly yours,

G. M. Harrison, Grand President.

cc: File 295-0

cc: Mr. G. E. Leighty, President, The Order of Railroad Telegraphers, 3860 Lindell Blvd. St. Louis 8, Missouri. Mr. Stanley B. Eoff, GC, 529 Governor Building, Portland 4, Oregon.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

PLAINTIFF'S RESPONSE TO REQUEST FOR ADMISSIONS—
Filed November 27, 1963

Comes Now the plaintiff and makes each of the admissions requested of it in defendant's Request for Admissions served upon counsel for plaintiff on November 8, 1963.

Lester P. Schoene, Philip Hornbein, Jr., Attorneys for Plaintiff.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

THE ORDER OF RAILROAD TELEGRAPHERS, Plaintiff,

v.

UNION PACIFIC RAILROAD COMPANY, Defendant.

Civil No. 8107

MEMORANDUM OPINION AND ORDER—July 15, 1964

Chilson, Judge.

This is an action to enforce an award of the National Railroad Adjustment Board.

[fol. 77] The matter is before the Court upon a motion to dismiss, based on three grounds:

1. That the plaintiff is not a proper party to bring this action;

2. That the portion of the action seeking an accounting fails to state a claim upon which relief can be granted;

3. That the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees and certain clerical employees of the defendant are indispensable parties.

The Court has considered the briefs filed in support of and in opposition to the motion and has heard oral argument and is now duly advised.

The Court concludes that the first two grounds of the motion to dismiss should be denied.

It Is Therefore Ordered that the motion to dismiss the complaint on the ground that the plaintiff is not a proper party to bring the action and to dismiss that portion of the action seeking an accounting be the same is hereby denied.

As to the third ground of the motion, the Court is of the opinion that the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees is an indispensable party to this proceeding.

The reasons for this conclusion are hereinafter set forth.

On June 25, 1963, the Adjustment Board entered its Award No. 9988.

The Award discloses that the plaintiff filed a claim with the Adjustment Board in which it contended that:

"(a) The Carrier has violated and continues to violate the agreement between the parties signatory thereto, when it requires or permits employes not covered by said agreement, to 'handle' train orders at West End Yard Office, Las Vegas, Nevada, and

"(b) That the Carrier has violated and continues to violate the agreement when it requires or permits other [fol. 78] than those covered by said agreement to operate printing and/or mechanical telegraph machines used in the transmission or reception of messages and reports of record, and/or to perforate tape or cards as a function in the transmission or reception of messages and reports of record at the West End Yard Office, Las Vegas, Nevada, and

"(c) That for such violations the Carrier shall compensate the senior idle employe or employes covered by the Telegraphers' Agreement for the equivalent of a day's pay for each 8-hour shift, both day and night, since August 25, 1952, the date on which the new yard office at Las Vegas was placed in service, at the telegraphers' rate applicable to that particular location."

The controversy before the Board so far as pertinent here involved the question of whether the operation of certain electro-mechanical devices in the yard office of the carrier at Las Vegas, Nevada should be operated by telegraphers. Upon the installation of these devices, the operation of certain of these electro-mechanical devices was as-

signed by the defendant to clerical employees who are members of the Brotherhood of Railway Clerks. Plaintiff in its claim submitted to the Adjustment Board contends that this work should have been assigned to telegraphers, and that the failure to do so was a violation of the collective bargaining agreement entered into between the plaintiff and the defendant. The plaintiff also sought compensation for the telegraphers who were idled by this alleged violation.

In accordance with Title 45, United States Code, Section 153 first (j), which provides:

"Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any dispute submitted to them,"

the Board notified the president of the Brotherhood of Railway Clerks and the general chairman, Mr. Stanley B. Eoff, of the pendency of the controversy, the date of the hearing, and stated, "You will have the right to appear and file papers and any documents you desire in answer thereto, . . . " (See Exhibit A attached to defendant's reply memorandum.)

[fol. 79] The president of the Brotherhood of Railway Clerks took the position that this was solely a dispute between the defendant on the one hand and the plaintiff on the other, involving the interpretation of the agreement between them, and that the Clerks were not involved in the dispute as their rights are predicated upon a separate agreement between the Clerks' Brotherhood and the carrier. (See Exhibit B attached to the defendant's reply memorandum.)

Standing upon this position the Clerks did not participate in the proceedings leading to the award here in question.

The Board found " . . . that the Carrier has violated the Telegraphers' Agreement when it permitted its clerical force to operate the two teletype receiving printers and the one teletype transmitter at its West-End Yard Office," and awarded compensation to the idle employees covered by the Telegraphers' Agreement.

The plaintiff brings this action to enforce the award. The Clerks' Brotherhood had not been made a party to the action and the defendant, by its motion to dismiss, raises the question of the indispensability of the Clerks as parties.

The basic question here involved is whether or not the Clerks have such an interest in this litigation as to be indispensable parties thereto.

The plaintiff's position may be best illustrated by that taken by the Clerks' Brotherhood in its letter to the Adjustment Board (Exhibit B attached to plaintiff's reply memorandum), which is that the present controversy is one involving solely the interpretation or application of an agreement between the plaintiff and defendant in which the Clerks have no interest.

The defendant on the other hand contends that inasmuch as the award in its ultimate effect gives to Telegraphers jobs now held by the Clerks, that the Clerks have such an interest in the litigation that they are indispensable parties.

Thus is posed the question of whether or not under the Railway Labor Act, two groups of employees competing for the same jobs under separate contracts with the same carrier shall be required to litigate their conflicting claims [fol. 80] in the same proceeding, or should they be permitted to proceed in separate proceedings to have their rights under their respective agreements adjudicated separately.

Prior to case law to the contrary, the Adjustment Board refused to bring competing groups before it in one proceeding, acting on the assumption that the Board had no authority under the Act to consider two agreements simultaneously, each in the light of the other. See Missouri-Kansas-Texas R. Co. et al. v. Brotherhood of Railway and S.S. Clerks, 188 F. 2d 302 at 305.

However, the case law is in substantial agreement that not only does the Board have such authority but a failure to exercise it by giving competing employees notice and an opportunity to be heard leaves the Board with no authority to enter an award. Brotherhood of Railroad Trainmen v. Templeton (Eighth Cir.), 181 F. 2d 527; Hunter v. Atchison, Topeka and Santa Fe Railway (Seventh Cir.), 171 F. 2d 594; Missouri-Kansas-Texas Railway Co. v. Brotherhood of Railway and S. S. Clerks (Seventh Cir.), 188 F. 2d 302; Allain v. Tummon (Seventh Cir.), 212 F. 2d 32; Order of Railroad Telegraphers v. New Orleans, Texas and Mexico Railway Co., 229 F. 2d 59.

The reasoning for this conclusion is well illustrated in the decision by the Seventh Circuit in Missouri-Kansas-Texas Railway Co. et al. v. Brotherhood of Railway & S. S. Clerks, supra, where the Court stated at page 306:

"We can think of no employee having a more vital interest in a dispute than one whose job is sought by another employee or group of employees.

"Obviously, it is desirable to settle controversies such as these involving so-called 'overlapping contracts' on the basis of the existing contracts wherever possible instead of compelling resort to the machinery provided by § 6 for changing agreements. Of course this may not always be possible, but it is certainly much more likely to result if both parties to the dispute are brought before the Board with their respective agreements and each is considered in the light of the other, together with the usage, practice and custom of the industry, or of the particular carrier."

[fol. 81] In the instant case the Board apparently recognized the effect of the case law above and made the Clerks parties to the proceeding. The question now presented to this Court is whether or not the Clerks are indispensable parties to this action to enforce the Board's award.

The Court concludes that they are.

Although 45 United States Code, Section 153 first (p) provides that in an action to enforce an award, the findings and order of the Board "shall be prima facie evidence of the facts therein stated," nevertheless such an action is a trial de novo. Callan v. Great Northern Railway Co., 299 F. 2d 908; Boos v. Railway Express Agency, Inc., 253 F. 2d 896; Ward v. New Orleans Public Belt Railroad Commission, 97 F. Supp. 1002; Shipley v. Pittsburgh and L.E.R. Co., 83 F. Supp. 722; Order of Sleeping Car Conductors v. Pullman Co., 47 F. Supp. 599.

It would appear that the reasoning requiring the Clerks to be parties to the proceeding before the Board is also applicable to the action to enforce the Board's award. If the Clerks are indispensable to a determination of the issues before the Board, then certainly they are indispensible to a determination of the same issues in a trial de novo before the court.

It was so held by the Eighth Circuit in Order of Railroad Telegraphers v. New Orleans, Texas and Mexico Railway Co., 229 F. 2d 59 (supra). That action also involved a job dispute. In 1943 the Clerks obtained Award 2254 from the Adjustment Board finding that the carrier was violating its agreement with the Clerks in not assigning certain work at Anchorage, Louisiana to the Clerks. In 1950 the Adjustment Board, in a proceeding brought by the Telegraphers, awarded the same work to the Telegraphers by Award 4734.

The Telegraphers were not a party to the 1943 proceeding and the Clerks were not a party to the 1950 proceeding.

The Telegraphers brought suit in the United States District Court to enforce Award 4734. The District Court held the award void because the Clerks were not made parties to the proceeding before the Board and dismissed the action. [fol. 82] The Eighth Circuit affirmed the dismissal by the District Court but did not confine its reasons therefor to those given by the District Court.

The Eighth Circuit opinion states:

"The subsection (p) under which this action was brought provides 'Such suit in the District Court * * * shall proceed in all respects as other civil suits * * *' (with certain exceptions not here relevant). It is well settled that a Federal Court will not proceed to final decision of a controversy brought before it without the presence of all 'who not only have an interest in the controversy but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.' Shields v. Barrow, 17 How. 129, 58 U.S. 129, loc. cit. 139, 15 L. Ed. 158; Wesson v. Crain, 8 Cir., 165 F. 2d 6, loc. cit. 9, and cases cited. Rule 19 of the Federal Rules of Civil Procedure, 28 U.S.C.A. has not modified the requirement as to indispensable parties. Wesson v. Crain, supra, and the undisputed facts in this case demonstrate that the Clerks are indispensable parties without whose presence justice cannot be done."

In its opinion the Eighth Circuit took cognizance of Whitehouse v. Illinois Central Railroad Co., 349 U.S. 366. The Court in Whitehouse recognized and discussed the question of parties to such controversies, and some of the statements in Whitehouse appear to be contrary to the substantial agreement among the courts of appeal which hold that employees who compete for the jobs in controversy are indispensable parties to the proceedings before the Adjustment Board. But as the Eighth Circuit pointed out, the Supreme Court declined to adjudicate the questions which it discussed and found nothing in the Whitehouse case which controlled.

The Supreme Court refused to review the Eighth Circuit decision. (Certiorari denied 350 U.S. 997.)

This Court concurs in the Eighth Circuit's analysis of Whitehouse and believes the reasoning sound which led

that Court to its conclusion that the Clerks were indispensable parties to the action to enforce the award.
[fol. 83] Therefore, the Court finds that the Clerks are parties indispensably necessary to a full and final adjudication of this action and that due to the failure to make their bargaining agent, namely, the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, a party to this action, the motion to dismiss on the ground of failure to join indispensable parties should be granted.

It Is Therefore Ordered that the motion to dismiss the complaint on the grounds that the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees is an indispensable party to this action be and the same is hereby granted and the complaint is dismissed.

It Is Further Ordered that the plaintiff shall have 30 days from this date within which to file an amended complaint making the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees a party defendant to this action and to cause process to be served upon said party.

It Is Further Ordered that if the plaintiff fails to file an amended complaint making the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees a party defendant and to cause process to be served upon said Brotherhood within the time allotted, this Court will, upon ex parte application of the defendant, order the entry of final judgment of dismissal of this action.

Dated at Denver, Colorado, this 15th day of July, 1964.

By The Court: Hatfield Chilson, Judge, United States District Court.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

AMENDMENT TO MEMORANDUM OPINION AND ORDER—
July 27, 1964

This Court on July 15, 1964 entered a memorandum opinion and order in the above entitled matter. In the [fol. 84] eighth paragraph on page two the Court stated that the Adjustment Board entered its award on June 25, 1963. This is an error in that the Adjustment Board entered its award on July 14, 1961.

It Is Therefore Ordered that the eighth paragraph on page two of said memorandum opinion and order is hereby amended to read as follows:

"On July 14, 1961, the Adjustment Board entered its Award No. 9988."

Except as amended hereby, the memorandum opinion and order entered on July 15, 1964 shall remain in full force and effect.

Dated at Denver, Colorado, this 27th day of July, 1964.

By The Court: Hatfield Chilson, Judge, United States District Court.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

THE ORDER OF RAILROAD TELEGRAPHERS, Plaintiff,

v.

UNION PACIFIC RAILROAD COMPANY, Defendant.

Civil No. 8107

FINAL JUDGMENT OF DISMISSAL—September 30, 1964

On July 15, 1964, this Court entered its Memorandum Opinion and Order in the above matter finding that certain clerical employees were parties indispensably necessary to a full and final adjudication of this action and that defendant's motion to dismiss should be granted since the Clerks' bargaining agent, namely, the Brotherhood of Railway and Steamship Clerks, Freight Handlers and Station Employees, had not been made a party to this action. The Court ordered that the complaint be dismissed. It was further ordered, however, that plaintiff be given 30 days in which to file an amended complaint herein making the said Brotherhood a party defendant in this action and to cause process to be served on said Brotherhood but that if it failed to do so, this Court would, upon defendant's ex parte application, order the entry of final judgment of dismissal of this action. Pursuant to agreement of the parties and this Court's order dated August 13, 1964, the time within which plaintiff would have to file its amended complaint and to cause process to be served upon the said Brotherhood was enlarged for a period of 30 days to and including September 14, 1964.

[fol. 85] Plaintiff has failed to file an amended complaint herein making the said Brotherhood a party defendant to the above action and to cause process to be served upon said

brotherhood as directed in this Court's order of July 15, 1964, as amended by order dated August 13, 1964. The defendant has filed a motion requesting that the Court order the entering of final judgment of dismissal of this action and the Court finds that such motion should be granted and that final judgment of dismissal should be entered herein.

It Is, Therefore, Ordered that the complaint and this action be and hereby is dismissed with prejudice.

Dated at Denver, Colorado, this 30th day of September, 1964.

By The Court: Hatfield Chilson, Judge, United States District Court.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

NOTICE OF APPEAL—Filed October 23, 1964

Notice Is Hereby Given pursuant to Rule 73(b) of the Rules of Civil Procedure that The Order of Railroad Telegraphers hereby appeals to the United States Court of Appeals for the Tenth Circuit from the final judgment entered in this action on September 30, 1964, and from the Memorandum Opinion and Order entered herein by the Court on July 15, 1964.

Dated this 23rd day of October, 1964.

Lester P. Schoene, Philip Hornbein, Jr., Attorneys for Plaintiff.

Of Counsel: Schoene and Kramer.

[An appeal bond was filed October 23, 1964]

[fol. 86]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

STATEMENT OF POINTS TO BE RELIED UPON ON APPEAL—
Filed October 23, 1964

Pursuant to the provisions of Rule 75(b) of the Rules of Civil Procedure, The Order of Railroad Telegraphers, plaintiff-appellant, files this, its statement of points to be relied upon on appeal:

1. The Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees is neither a proper, necessary or indispensable party to this action.

2. The Court Committed error in granting defendant's motion to dismiss plaintiff's complaint.

3. The Court committed error in entering judgment of dismissal.

Lester P. Schoene, Philip Hornbein, Jr., Attorneys for Plaintiff-Appellant.

Of counsel: Schoene and Kramer.

Clerk's Certificate (omitted in printing).

[fol. 87]

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

No. 7968—March 1965 Term

THE ORDER OF RAILROAD TELEGRAPHERS, Appellant,

v.

UNION PACIFIC RAILROAD COMPANY, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Milton Kramer, of Schoene and Kramer, Washington, D. C. (Philip Hornbein, Jr., Denver, Colo., with him on the Brief), for Appellant.

James A. Wilcox, Omaha, Neb. (E. G. Knowles, Clayton D. Knowles, Denver, Colo., and Harry Lustgarten, Jr., Omaha, Neb., with him on the Brief), for Appellee.

Before MURRAH, Chief Judge, LEWIS and SETH, Circuit Judges.

OPINION—October 8, 1965

SETH, Circuit Judge.

[fol. 88] The opinion in this case filed by the Clerk on July 22, 1965, is hereby withdrawn, and the following substituted in its place:

This is an appeal from an order of the United States District Court for the District of Colorado, dismissing the appellant's petition for enforcement of an award of the National Railroad Adjustment Board for failure to join an indispensable party.

[File endorsement omitted]

The case before us is but another episode in the long-standing jurisdictional struggle between the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees ("Clerks"), and the Order of Railroad Telegraphers ("Telegraphers"). For a detailed history of the origins of this dispute, see Order of Railroad Telegraphers v. New Orleans, T. & M. Ry., 61 F.Supp. 869 (E.D.Mo.) *vacated and remanded* 156 F.2d 1 (8th Cir.), *cert. den.* 329 U.S. 758.

The facts in the controversy before the Board insofar as they are pertinent here are as follows: The dispute grew out of the action of the Union Pacific in 1952 in installing electronic equipment in its various yard offices, including the one at Las Vegas, Nevada, which brought about radical [fol. 89] changes in the carrier's car record procedures. In the operation of these machines, a communication function previously performed by the Telegraphers is apparently automatically performed by employees represented by the Clerks. Since the basic function of the machines is to handle clerical work, the job of punching the program cards and operating the machines was assigned to clerical employees. As a result of such action the Telegraphers filed a complaint with the Adjustment Board under 45 U.S.C.A. §§ 151-188.

The Telegraphers' claim before the Board was that the carrier had violated its collective bargaining agreement with the Telegraphers by assigning the work referred to to the Clerks. They prayed that for such violations the carrier be ordered to compensate those employees represented by the Telegraphers to whom the work should have been assigned. In compliance with 45 U.S.C.A. § 153, First (j), the Board served notice upon the Clerks as "employees . . . involved in any disputes submitted to them [the Board]." In reply, the President of the Clerks sent a letter to the Board stating the Clerks' position that the dispute was solely between the carrier and the Telegraphers, involving interpretation of the agreement between the two, and that [fol. 90] the Clerks would not therefore participate in the proceedings before the Board. However, the letter added

that if as a result of the proceedings before the Board, work belonging to the Clerks was taken away from them by the carrier, the Clerks would take appropriate action in separate proceedings before the Board.

The proceedings before the Board resulted in an award in favor of the Telegraphers against the carrier, and the carrier was ordered to compensate idle employees covered by its agreement with the Telegraphers. Upon the carrier's failure to comply with the award, the Telegraphers filed this action for enforcement in the District Court for the District of Colorado under 45 U.S.C.A. § 153, First (p). The carrier filed a motion to dismiss the enforcement action on the grounds the Telegraphers had failed to join an indispensable party, namely the Clerks. The court granted the motion and ordered that the Telegraphers should have thirty days from the date of the order to file an amended complaint. Upon failure of the Telegraphers to do so, the court entered final judgment of dismissal with prejudice. It is from this judgment that the Telegraphers appeal. The memorandum opinion and order granting the motion to dismiss with leave to file an amended complaint may be found at 231 F.Supp. 33.

[fol. 91] The jurisdiction of the National Railroad Adjustment Board is as set out in the Railway Labor Act, 45 U.S.C.A. § 153, First (i). This subsection provides that the appropriate division of the Adjustment Board shall have authority over disputes between the employees and a carrier arising from interpretation or application of collective bargaining agreements and grievances arising out of such contracts. Thus the Board is empowered to hear disputes which arise from grievances, from the interpretation or from the application of contracts. See Elgin, J. & E. Ry. v. Burley, 325 U.S. 711, 327 U.S. 661.

In the case at bar we are concerned with an interunion dispute. Two important cases of this character which have been considered by the Supreme Court are Slocum v. Delaware, L. & W. R.R., 339 U.S. 239, and Order of Railway

Conductors v. Pitney, 326 U.S. 561. There have also been a number of similar disputes which are considered in the opinions of the United States Court of Appeals in several Circuits. These cases all basically involve a dispute between two labor unions as to which group is entitled to particular jobs under their individual contracts with the railroad. These positions have come into dispute for the most part, as did the positions in the case at bar, by reason of the above decisions that the authority of the Adjust-
[fol. 92] ment Board has been established to entertain disputes of this character, although were the matter one of first impression we would have some doubt.

In the case at bar, under the existing decisions, it was necessary that the Adjustment Board give notice to the Clerks, and this was done as mentioned above. The National Railway Labor Act provides that notice be given to a party "involved" [45 U.S.C.A. § 153, First (j)]. The Act however also provides [45 U.S.C.A. § 153, First (m)] that the award shall be binding on "both" parties, and in subsections (o) and (p) reference is made only to the "carrier" and to the "petitioner." Thus the Act in some respects contemplates that there be but two parties, and the work "involved" in subsection (j) could be construed to refer to only one of these two parties. 9 Stan. L.Rev. 820. However, it has now become established that under the circumstances existing in this case, notice is required to be given to the Clerks Union. See, *e.g.*, Order of Railroad Telegraphers v. New Orleans, T. & M. Ry., 229 F.2d 59 (8th Cir.), *cert. den.* 350 U.S. 997; Allain v. Tummon, 212 F.2d 32 (7th Cir.); Hunter v. Atchison, T. & S.F. Ry., 171 F.2d 594 (7th Cir.), *cert. den.* 337 U.S. 916. Some courts have grounded this requirement on due process, while
[fol. 93] others have not placed it on a constitutional basis but have nevertheless made it a requirement. The court, in Order of Railway Telegraphers v. New Orleans, T. & M. Ry., supra, held in part that an Adjustment Board's award was void for failure to give notice to the Clerks, who were there "involved" as they are here. The Supreme Court in

Whitehouse v. Illinois Central R.R., 349 U.S. 366, considered a similar dispute between the Clerks and Telegraphers. Before the Board acted the carrier brought a separate action in the court to enjoin the Board from acting until notice was given the Clerks, the non-petitioning union. The Supreme Court as dicta mentioned the "substantial agreement among Courts of Appeal which have considered the question in holding that notice is required . . . ", but indicated it was not a constitutional question. This issue is fully covered in the trial court's opinion in the case at bar at 231 F.Supp. 33.

It is however apparent that the requirement that notice be given to the competing union in disputes of this character must be derived from the scope and nature of the issues before the Board. When the Board undertakes to enter the field of jurisdictional disputes as it has done, it is apparent that the issues considered in each petition must necessarily concern at least one other union in addition to [fol. 94] the one filing a petition. This "concern" is a very real one by reason of the obvious fact that there is but one job or classification which is sought for the members of two different and competing unions. Since the issues are of this nature, it is understandable that it would be required that notice be given to the non-petitioning union. There is thus an interrelation of notice, parties, and issues. The requirement of notice in the statute and developed in the decisions is a clear indication or measure of the proper scope of the issues before the Adjustment Board, regardless of what procedural or evidentiary limitations it may impose.

The record in this case shows that the Board considered the contract of the petitioning union as if the contract with the non-petitioning union purportedly covering the same job does not exist at all. The jurisdictional dispute was thus decided in a piecemeal manner, the Board ostensibly acting under its jurisdiction to interpret a contract between a carrier and *a* union. Other contracts for what appeared to be the same jobs were excluded by its rules of evidence.

The Supreme Court in a case concerned with the matter of notice and of primary jurisdiction of the Board said:

> "We have seen that in order to reach a final decision . . . the court first had to interpret the terms of O.R.C.'s [fol. 95] collective bargaining agreements. The record shows, however, that interpretation of these contracts involves more than the mere construction of a 'document', in terms of the ordinary meaning of the words and their position . . . *For O.R.C.'s agreements with the railroad must be read in the light of others between the railroad and B.R.T. And since all the parties seek to support their particular interpretation of these agreements by evidence as to usage, practice and custom, that too must be taken into account and properly understood.* The factual question is intricate and technical. An agency especially competent and specifically designated to deal with it has been created by Congress. Under these circumstances the court should exercise equitable discretion to give that agency the first opportunity to pass on the issue." Order of Railway Conductors v. Pitney, 326 U.S. 561 (citations omitted and emphasis added).

This statement is most important in the case at bar because the Supreme Court in the cited case, and in Slocum v. Delaware, L. & W. R.R., 339 U.S. 239, has recognized the au- [fol. 96] thority of the Board to consider these jurisdictional-contract disputes and should be taken as an indication as to how it should be done. If we are to consider that the Board has authority over this dispute, it must exercise it over the whole dispute at one time, not half at one time with one set of participants, and half at another. The notice requirement whatever its basis, and the Supreme Court's statements in Order of Railway Conductors v. Pitney, 326 U.S. 561, that the contracts of one must be read in the light of the other, lead to the conclusion that the fundamental issues before the Board included those per-

taining to the Clerks and to their contract. Their claim to the same jobs requires that the Telegraphers' contract and position be examined in the light thereof before the dispute can be realistically settled. The Clerks for all practical purposes thereby become parties to the administrative proceedings.

The record before us is thus incomplete by reason of the Board's failure to conduct the hearing in a manner so as to receive evidence and to construe the Telegraphers' contract with regard to, and with reference to the Clerks' position and contract. A complete hearing would include all issues, practice, and usage, including the effect of the Clerks' contentions and contract, which are necessary to a [fol. 97] complete disposition of the dispute as to all concerned parties. The Board has primary jurisdiction, and must make an initial determination, if petitioned to act, before a court can act on a complete proceeding should it be requested to do so. Slocum v. Delaware, L. & W. R.R., 339 U.S. 239; Order of Railway Conductors v. Pitney, 326 U.S. 561.

The statutory provision that the findings and order of the Board are prima facie evidence of the facts therein stated [45 U.S.C.A. § 153 First (p)] when given its fullest effect still left the trial court and us with facts as to only part of a dispute, and certainly not enough upon which to base a decision.

The District Court dismissed appellant's petition for failure to join an indispensable party—the Clerks. Had these parties been joined and appeared presumably the matters relating to their position and contract could have been presented to the court thereby filling the same void we find to exist. Our difference with the District Court is only in that the Board should under the doctrine of primary jurisdiction have the first opportunity to consider the entire controversy, including the Clerks' contract.

The disposition of the case by the trial court is

Affirmed.

[fol. 98]

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JUDGMENT—October 8, 1965

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable David T. Lewis and Honorable Oliver Seth, Circuit Judges.

It is now here ordered by the court that the opinion in this cause filed on July 22, 1965, be and the same is hereby withdrawn and that the judgment of this court entered on July 22, 1965, be and the same is hereby vacated.

It is further ordered that the opinion in this cause filed October 8, 1965, be substituted for the opinion of July 22, 1965, and that the judgment of the lower court be and the same is hereby affirmed.

[fol. 99] Clerk's Certificate (omitted in printing).

[fol. 100]

SUPREME COURT OF THE UNITED STATES

No. 652, October Term, 1965

TRANSPORTATION-COMMUNICATION EMPLOYEES UNION, Petitioner,

v.

UNION PACIFIC RAILROAD COMPANY.

ORDER ALLOWING CERTIORARI—February 21, 1966

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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